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# REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

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M A R C U S T. H U N, R E P O R T E R.

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VOLUME XXVI.

1898.

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The attention of the profession is called to the fact that the Court of Appeals in many cases decide an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 131 N. Y. 490.)—[REP.]





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# Cases

DETERMINED IN THE

## FIRST DEPARTMENT

IN THE

### APPELLATE DIVISION,

February, 1898.\*

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H. KOEHLER & Co., Appellant, v. ISAAC REINHEIMER, Respondent.

*Corporation—guaranty of a lease, executed by a brewing company in consideration of the lessee's promise to buy beer from the company—the plea of ultra vires cannot be asserted—sealed instrument expressing a consideration.*

A guaranty of the performance by the lessee of premises to be used as a saloon, of the conditions and covenants contained in the lease, executed by a corporation organized under the General Manufacturing Act (Laws of 1848, chap. 40), for the manufacture of ales and beer, in consideration of the lessee's promise to buy his beer of the corporation, is not *ultra vires*.

When, moreover, it appears that the lessor delivered possession of the premises to the lessee, in reliance upon such guaranty, the corporation will not be permitted to advance the plea of *ultra vires*.

The fact that such a contract is under seal and expresses a consideration is sufficient to support it.

APPEAL by the plaintiff, H. Koehler & Co., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 20th day of April, 1897, upon the decision of the court rendered after a trial before the court without a jury at the New York Trial Term dismissing the complaint.

*E. J. Myers*, for the appellant.

*David Gerber*, for the respondent.

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\*The other cases of this term will be found in volume 25 App. Div.—[REP.



RUMSEY, J. :

The plaintiff is a corporation organized under the general law of 1848 (Chap. 40), and the objects for which it is organized are the manufacture and sale of various kinds of ales and beer. In the month of November, 1890, certain infants, the owners of a building in this city, were, by their special guardian, about to lease the premises to one Hyland to be used as a saloon for the sale of beer. The plaintiff corporation had agreed to guarantee the performance of the covenants of the lease by Hyland. Before that was done, however, the plaintiff entered into a contract with the defendant under his seal, which recited the fact that the lease was about to be made, describing it, and that Koehler & Co. were about to guarantee the performance of the conditions in the lease; and the defendant agreed that, if default should be made by the lessee in the performance of any of the covenants, and the said Koehler & Co. should be called upon to pay the rent or perform the conditions of the lease, he would pay to Koehler & Co. the rent or any arrears thereof that might remain due under the lease, and all damages that might arise in consequence of the non-performance of the covenants or either of them. The lessee defaulted in the payment of certain of the rent, and the lessor thereupon brought an action against Koehler & Co. to recover the amount not paid by the lessee. That action was settled by Koehler & Co. by the payment of a less amount than was actually due to the lessor, and in return for that payment it obtained a receipt in full for the amount unpaid and a release from further liability upon its guaranty. Having made that payment, Koehler & Co. brought this action to recover the amount it had paid and the expenses to which it had been put. At the Trial Term the complaint was dismissed, the court deciding that the contract of guaranty entered into by Koehler & Co. with the lessor was not within its power as a corporation to make; that, consequently, the contract could not have been enforced against it had it resisted, and that the defendant was only bound to indemnify the plaintiff against a legal liability which it could have been compelled to perform. The complaint was dismissed, therefore, upon the sole ground that the contract between the plaintiff here and the lessor, by which the plaintiff guaranteed the performance by the lessee of the covenants contained in the lease, was *ultra vires*; and, conse-

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quently, the only question presented in this case is whether in that conclusion the court was correct. For the purposes of the case it will be conceded that the contract of the defendant was simply a contract of indemnity and not solely a guaranty, and that the defendant could not be compelled to answer to the plaintiff for the performance of any act which the plaintiff was not legally compellable itself to do. It will not be questioned either that if the plaintiff here had any defense to the action brought against it by the lessor, the defendant is entitled to have the benefit of that defense in this action to the same extent and with the same effect as though the defense had been interposed successfully by the plaintiff in the action against it. The only question, therefore, which will be considered, is whether the plaintiff here was liable upon its contract to guarantee the performance of the conditions of the lease. That question has been presented to the courts of this State several times within the last few years, and while the decisions upon the subject are contradictory, yet it may fairly be said that the weight of authority is to the effect that such a contract by a brewing company is not beyond its powers. (*Fuld v. The Burr Brew. Co.*, 18 N. Y. Supp. 456; *Holm v. The Claus Lipsius Brew. Co.*, 21 App. Div. 204.)

The case of *Filon v. The Miller Brewing Company* (15 N. Y. Supp. 57) has been cited as laying down a different rule. The question there was not presented in precisely the same way. In that case the secretary of the Miller Brewing Company had leased from Filon certain premises to be used by a third person. It appeared that the company did not take possession of the premises leased and did not make any effort to occupy them, but that it proposed to permit a third person to use them, and there was grave doubt in the case whether the secretary who executed the lease had any power to do so. The court held in that case that the proper execution of the lease had not been proved so as to charge the brewing company. It was also held by the justice delivering the opinion that if the secretary had power to execute the lease, the act was outside of the purposes for which the company was incorporated, and, therefore, it was *ultra vires*, and the defendant was not liable upon the lease. If that case could be deemed an authority that a corporation in guaranteeing a lease for the purpose of increas-

ing the sales of the article in which it deals, necessarily goes beyond its powers so that its contract of guaranty is void, it must be deemed to be overruled by the two cases cited above. The same question was presented to the Supreme Court of Wisconsin in a very recent case where the facts were almost precisely as they are here, and it was held that a brewing company had the power to make such a guaranty and was liable upon it. (*Winterfield v. The Cream City Brew. Co.*, 71 N. W. Rep. 101.) But if, upon a consideration of the authorities, it shall be deemed that the question has not been settled in this State, and is still open for consideration, nevertheless we think that upon principle the plaintiff was clearly liable on the contract it made. Its business was the manufacture and sale of beer. Hyland was about to open a saloon in which beer should be sold. He had not before that time been a customer of the plaintiff, but he promised in case the plaintiff executed this guaranty that he would buy his beer of it, and the guaranty was executed for the purpose of securing a customer, and that was its object. The contract to guarantee this lease was not illegal in the sense that it was forbidden by the statute or that it was against public policy. It is *ultra vires*, if at all, simply because it does not relate to something within the purview of the objects for which the corporation was organized. A trading corporation like this has the right to foster its legitimate business by all usual and proper means, and it may make all contracts which are useful or necessary to enable it to carry on the business or accomplish the objects of its incorporation. (*Old Colony R. R. Corporation v. Evans*, 6 Gray, 25, 38.) It is said by Judge EARL in the case of *Holmes v. Willard* (125 N. Y. 75, 81) that a corporation dealing in manufactured goods and needing them for sale, may, as a proper incident to its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods. The doctrine of *ultra vires* took its rise at a very early day in the history of corporations, at a time when they were not common and were created for *quasi* public purposes and regarded to a certain extent as public in their nature. At that time not only was their manner of contracting closely limited, but their power to make contracts was jealously guarded and the courts were not slow to invalidate any act by which a corporation might go beyond the express powers which had been

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granted to it. But that doctrine has been considerably limited in later days. Corporations are now organized to carry on every kind of business which may be performed by individuals. The purposes of trading corporations are in no way public in their nature. So far as the people are concerned, whether a corporation shall make one contract or another, so long as it advances the purposes for which the corporation was organized, is absolutely unimportant; and so the rule has come to be laid down that, except as restrained by law, trading corporations have the implied power to make all such contracts as will further the objects of their creation, and their dealings in this regard may be likened to those of an individual seeking to accomplish the same ends. (4 Am. & Eng. Ency. of Law, 245; 1 Morawetz Corp. § 320; Green's Brice's Ultra Vires, 72.)

In examining the question whether a contract of a trading corporation is beyond its powers, it is not very important whether the contract was a sagacious one to make or not. If it appears that the thing done tended to increase the business it was organized to do, the courts need not concern themselves with the question whether the contract was a wise one. The simple question is, if the contract were carried out, whether it would have been likely to increase the business of the corporation. In this case, as the contract appears to have been made with the purpose of obtaining a customer for the plaintiff's beer, the only thing to be examined is whether, if the arrangement had been carried out as expected at the time the contract of guaranty was entered into, it would have tended to increase the sales of the commodity in which the plaintiff dealt. The arrangement with Hyland may not have reached the dignity of an enforceable contract, but yet it may well have resulted in a great increase of the plaintiff's business, and if so, it was undoubtedly a reasonable contract for it to make. The purpose of the plaintiff's organization was to make and sell beer. It was undoubtedly competent to enter into any contract adapted to further that purpose and not against public policy. No one would hesitate to say that the plaintiff might have rented a place in which to dispose of its wares, and established an agent there for that purpose. Can it be said, *as a matter of law*, that it was foreign to the purposes of its organization to enter into a contract with a person who was engaged

in the sale of that sort of wares by which it should be made worth his while to deal exclusively in the plaintiff's wares? Clearly it could not, and if the arrangement operated successfully it was quite certain that the business of the plaintiff would be increased. It may be said that there was nothing to show that the contract was one which was customary to be made in the business, but that is of no importance. The question is whether, upon a consideration of all the facts, it appears that the contract was one which could have fostered the purposes for which the corporation was organized. If it might, then it was within the power of the corporation to make it, otherwise not. That question, as it seems to us, must clearly be answered in the affirmative in this case.

An examination of the record shows that the persons entering into this lease were infants; that an application had been made to the court by their special guardian to authorize the lease of these premises; that the special guardian reported to the court the terms upon which the lease was to be made and that one of those terms was that the lease was to be guaranteed by the plaintiff. That report was accompanied by a memorandum of an agreement by which the lessee undertook to procure such a guaranty, and the order of confirmation authorizing the execution of the lease required that, in addition to the usual covenants, it should contain certain other conditions, one of which was that the lessee should procure H. Koehler & Co. to guarantee in the usual form the performance of the covenants and conditions contained in the lease. It is apparent from these facts that this guaranty given by the plaintiff was a condition upon which the lessor was permitted to enter into the lease, and that the lease was executed upon the express authority of that guaranty. It was, therefore, so far as the plaintiff was concerned, an executed contract by which, in reliance upon the act of the plaintiff, the lessor had delivered over the possession of this property under the lease to the lessee. That state of facts brings the case precisely within the case of *Whitney Arms Co. v. Barlow* (63 N. Y. 62), in which it was said that a corporation will not be permitted to advance the plea of *ultra vires* where the contract with regard to which it is interposed was one entered into in reliance upon the act of the corporation. (See, also, *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24.) It may be said that the liability imposed

upon this plaintiff by this contract of guaranty was greatly in excess of any possible benefits that could accrue; but nothing of that sort appears, nor would it be of any importance if it did. Neither the directors nor the stockholders of the plaintiff seem to have made any objections to the contract, and the validity of such a contract does not depend upon the question whether it was a wise one to make, but upon whether the object of it was to increase the business of the company, and whether, upon the whole, it was possible that that object could have been attained.

It is said that there was no consideration moving to Reinheimer for his contract of indemnity. Upon that point it need only be remarked that his contract was under seal and expressed a consideration, and that was amply sufficient to support it.

We do not consider whether Reinheimer was induced to enter into this contract by false representations. While evidence was given upon both sides in regard to that matter, the court did not pass upon it, but put its decision solely upon the ground that the contract was one which the plaintiff had no power to make. Our judgment is that, upon the facts appearing here, this contract of guaranty was one within the power of the plaintiff to enter into; that it could have no defense to the action brought against it by the lessor, and, therefore, it was entitled to be indemnified against the liability which it incurred, and should have recovered from the defendant the amount it lost.

The judgment, therefore, should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., BARRETT, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

BELLA CARDONNER, as Administratrix, etc., of JOHN C. CARDONNER,  
Deceased, Respondent, v. THE METROPOLITAN STREET RAILWAY  
COMPANY, Appellant.

*Negligence — death of a bicycle rider coming out from behind an approaching car at  
a street railroad crossing.*

A corporation maintaining a street railway in New York city which, at a point where its line turns from Seventh avenue into Fifty-third street, stations a man between the tracks, whose duty it is to signal cars to round the curve, and another at the crosswalk to warn any one attempting to cross Fifty-third street of the approach of a car around the curve, and which also provides a flag signal at which cars approaching from the north on the avenue stop until signaled to proceed, is not liable for the death of a bicycle rider who, after riding at the rate of from six to ten miles an hour behind a car bound south on Seventh avenue, turns out to the west when the car stops at the signal north of Fifty-third street and keeps on with unabated speed until he is struck by a car rounding the curve from the south, there being no evidence that either the signalmen or the motorman could have seen him until he came in front of the south-bound car, when it was too late to avert the collision.

APPEAL by the defendant, The Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of June, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 22d day of June, 1897, denying the defendant's motion for a new trial made upon the minutes.

The action was brought to recover damages for the death of the plaintiff's intestate, which was caused by the alleged negligence of the defendant.

*C. F. Brown*, for the appellant.

*W. C. Beecher*, for the respondent.

PATTERSON, J. :

Upon a critical examination of all the evidence appearing on the record of the trial of this cause, we are irresistibly led to the conclusion that the court should have directed a verdict for the defendant, and, hence, that the judgment and order appealed from must be reversed.

Negligence of the defendant's servants was not shown. The accident which resulted in the death of the plaintiff's intestate happened under peculiar conditions, and the liability of the defendant for negligence of its servants must be considered, not only with reference to an emergency suddenly arising, but with regard to the preparations made by the defendant for meeting possible conditions, such as existed at the time the accident occurred; and also with reference to the conduct of the servants of the defendant in charge of the car which collided with the plaintiff's intestate, and of its servants stationed in the street to prevent a collision of vehicles with its cars. Having regard to all the circumstances and conditions existing at the time this accident occurred, we are unable to see that there was any omission of duty on the part of the defendant's servants, either on or off the car, or in the provision which had been made by the defendant to prevent such accidents as that which happened to the plaintiff's intestate; or that there was anything to submit to the jury on any of those subjects.

The accident occurred at the intersection of Seventh avenue and Fifty-third street, on the west side of the avenue. At Fifty-third street there is a curve in the line of the defendant's road where the tracks turn into Fifty-third street to run westerly to Ninth avenue. The car which collided with the plaintiff's intestate was proceeding northerly on a transit requiring it to turn into Fifty-third street. It stopped on Seventh avenue between Fifty-second and Fifty-third streets on the easterly track, and at about a point at which a signal was placed with the word "Stop" upon it. That signal was located about 80 feet south of the point at which began the curve of the tracks going into Fifty-third street, and about 129 feet from the southerly side of Fifty-third street. Stationed at Fifty-third street and between the tracks on the Seventh avenue and on Fifty-third street was a flagman, whose duty it was to give signals, and who, at the time of this accident, did signal to the motorman on the car to start and to round the curve at Fifty-third street. There was another man stationed on the crosswalk at Fifty-third street on the west side of Seventh avenue, and his duty was to signal or give warning to any one attempting to cross Fifty-third street, of the approach of a car around the curve. The signalman was so stationed at the time of the accident. On



Seventh avenue north of Fifty-third street was a flag on a standard ; at that point all cars going south on the westerly track on Seventh avenue above Fifty-third street came to a stop until the motormen of such south-bound cars were signaled by the flagman to proceed. On the morning of the accident in question, the plaintiff's intestate was riding his bicycle at a rate of speed which is variously estimated at from six to ten miles an hour. He was coming down Seventh avenue and at some distance behind a south-bound car of the defendant on the westerly track above Fifty-third street. That car stopped at the flag signal above Fifty-third street. The plaintiff's intestate was riding between the rails of the westerly track, and when the car in front of him stopped, he turned out to the west, kept on without abatement of speed, and when he reached the curve on Fifty-third street and near the westerly crosswalk, he was struck by the defendant's car and sustained injuries from which he died. The question of negligence of the defendant is somewhat involved with that of the acts of the plaintiff's intestate himself, but separating the two matters and considering the relation of the defendant alone to the occurrence, it is made to appear sufficiently that great care was observed in the management of the cars of the defendant, so far as the employment of persons stationed on the street is concerned. Neither of the flagmen was shown to have omitted anything he could have done to prevent the accident. There is nothing, therefore, to show that the flagman stationed between the crosswalks on the Seventh avenue could have seen the plaintiff's intestate while he was behind the south-bound car and between the rails of the westerly track and before he turned out. There is nothing to show that the flagman on the crosswalk could have seen him until the accident was imminent or until he turned out. It was shown that ample provision was made to prevent collisions and that each of the flagmen performed his full duty.

If any negligence can be imputed to the defendant's servants, therefore, it must be to the motorman of the car, and here the evidence fails again. There was nothing to show that the motorman could have seen the plaintiff's intestate before the south-bound car stopped, or that he was in a line of vision until the plaintiff's intestate came in front of the south-bound car, at which time the car which struck the decedent was on the curve of Fifty-third

street. There was nothing, then, to show any neglect of the motorman in not fully stopping his car, or in not making an effort to stop it. As soon as the motorman saw the plaintiff's intestate, he released the grip and applied the brake (the gong was sounding all the time), "the cable fell out and the car slid along." The motorman was performing his full duty; he was considering the condition of the avenue and of the street at the curve. His attention was attracted to a woman who was crossing the street and who he thought might be in peril; she "jumped back" and then he saw on the other side the plaintiff's intestate coming, as all agree, at a rapid rate towards the curve, with the situation of which and the operation of cars about which, he was entirely familiar, as he was in the habit of riding twice or more every day on his bicycle across that curve. We do not see, therefore, that there was any negligence shown on the part of the motorman. The claim that the duty was incumbent upon the motorman in turning the curve to be vigilant in order to prevent collisions with vehicles going southward is, as a general statement, entirely correct, but under the conditions disclosed by the proof in this case we fail to see that anything is shown to have been omitted by him that prudence and care would have required. Irrespective of any other question in the case, and without considering whether it was not clearly shown that the accident was caused by the impetuous riding of the plaintiff's intestate at a point known to him to be dangerous, we are of the opinion that, on the whole evidence, the defendant was entitled to a verdict on this question of negligence.

The judgment and order appealed from must be reversed and a new trial ordered, with costs to appellant to abide the event.

VAN BRUNT, P. J., BARRETT, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, cost to appellant to abide event.

MARY PAGET and Others, as Trustees, Plaintiffs, v. ELLEN S.  
MELCHER and Others, Defendants.

*Deed — a direction to a trustee to convey is not a present gift — will — a declaration, that personal property shall “belong” to children, conveys a vested devisable remainder — how far a subsequent gift over by way of substitution modifies it — the Special Term cannot alter the conclusions of a referee appointed to hear and determine an action of partition.*

A direction, contained in a deed of trust, that the rents and profits of certain premises be paid to the wife of the grantor during her life, and upon her death to him, should he survive her, and that, after the death of the survivor of the parents, the trustee should convey the premises to the children of the grantor in fee — the issue of any child who should have died leaving issue at the death of the survivor of the parents to take the same share which their parent would have taken if living — contains no words of present gift, and final distribution must be made among those persons who constitute the class at the time when the division is directed to be made.

Where the will of a testator declares that, after the death of his wife, his personal property “shall belong to my (his) children, the descendants of any deceased child to take the share their parent would have taken, if living,” the children living at the testator’s death take remainders which vest at once and are devisable: and a subsequent provision of the same clause that “if no descendants of mine survive my said wife, then my property shall belong and be delivered over by my executors to the same persons named as residuary legatees in case of such failure of descendants, in the next clause of this will, and in the same proportions,” does not postpone the vesting of the remainders already created by the express words of the gift, but is merely a gift over by way of substitution, upon the contingency of an absolute failure of issue of the testator at the time of the death of his widow.

VAN BRUNT, P. J., and RUMSEY, J., dissented.

*Seemle*, that where the issues in an action of partition have been referred to a referee to hear and determine, and he has made an interlocutory report fixing the respective shares of the property to be partitioned, to which each of the parties is entitled, and directing a certain judgment to be entered, the direction of the court as to the entry of judgment (required in the first department) must conform to that contained in the referee’s report, and the Special Term has no power to modify such direction of the referee.

MOTION by the plaintiff, Mary Paget, and by the defendants, The Union Trust Company and others, for a new trial made upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, an interlocutory judgment having been entered in the office of the clerk of the county of New York on the 8th day

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of July, 1897, upon the decision of the court rendered after a trial at the New York Special Term.

The facts are stated in the dissenting opinion of Judge RUMSEY.

*F. R. Minrath*, for the plaintiffs.

*F. B. Candler*, for the administrators of Henry L. Stevens.

*J. Albert Lane*, guardian *ad litem* for infant defendants, for the motion.

*George Zabriskie*, for the defendant Ellen S. Melcher, opposed.

PATTERSON, J. :

I concur in so much of the opinion of Mr. Justice RUMSEY as relates to the construction of the deed of trust and the extent of the interests acquired by the *cestuis que trust* thereunder; but I am not able to concur in the views expressed by him concerning the personal property that passed under the will of Paran Stevens. The difference between the provisions of the deed and those of the will is striking. In the deed there are no present words of grant to the children of Paran Stevens; under the will the bequest was distinctly to them after the life estate in their mother. The words used in the deed annex futurity to the grant; those used in the will indicate a present gift. Upon the decease of the testator's wife, the personal property, he declares, "*shall belong* to my children, the descendants of any deceased child to take the share their parent would have taken, if living." It is not and cannot be claimed that, if the provision ended there, there would not be an absolute vested remainder in the three children of the testator in equal parts. But the will proceeds to provide as follows: "And if no descendants of mine survive my said wife, then said property shall belong and be delivered over by my executors to the same persons named as residuary legatees in case of such failure of descendants in the next clause of this will and in the same proportions."

The effect of this gift over is not to postpone the vesting in interest of the remainders created by the express words of the gift, limited upon the particular estate. It is unnecessary to go further than the statute to determine that the remainders vested. They so vest (1 R. S. 723 § 13) when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing

of the intermediate or precedent estate. Is it to be questioned that if Mrs. Stevens, the widow, had died before her son, Henry Leiden Stevens, the three children of Paran Stevens would have had the immediate right of possession? The test of that right, in connection with the vesting of the remainder, is not the certainty that the remaindermen will take in possession. "A remainder is vested where the interest is fixed, although it may be uncertain whether it will ever take effect in possession. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder." (*Grout v. Townsend*, 2 Den. 338.) What is the effect, then, of the gift over in this will? It is not a provision to prevent or postpone the vesting in interest or to throw forward the ascertainment of who shall take as remaindermen to the period of the death of the testator's widow. It is merely an executory gift over by way of substitution, on the contingency of an absolute failure of issue of the testator at the time of the death of his widow. The remainders given to the children are subject to be divested, but only in one event, that is, the total failure of issue of the testator to take the property in possession at the expiration of the particular estate. There is no gift over to any one child; there is no provision for divesting the remainder on the death of any one child before the expiration of the intermediate estate; there is nothing which in any way would indicate survivorship among the children. All that is provided for relates, as clearly as language can state it, to the complete failure of issue of the testator at the time of the death of his widow. The testator contemplated and intended only one event, therefore, in which the remainders should be divested; that was the only condition that could by any possibility defeat the remainders vesting in possession. They must be divested as to all before that result can follow as to either of the interests in remainder. The situation in this case may be illustrated by what was decided in *Skey v. Barnes* (3 Mer. 340), where it was held that a devise over upon a contingency does not prevent the shares from vesting in the meantime, provided the words of bequest be, in other respects, sufficient to pass a present interest, although such a devise over of the entirety may be called in aid of other circumstances to show that no present interest was intended to pass. There are no other circum-

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stances appearing in this case that would indicate an intention of the testator to postpone the vesting of the remainders in interest until the death of his widow. There was a question of survivorship in the case cited as affected by the nature of the property, but that question is not involved here. The general case was, that personal property was given to trustees upon trusts to pay interest to one person for life; after her death to pay and divide the principal among such life tenant's children and the issue of a deceased child as she should appoint. In default of appointment, to go and be equally divided among the life tenant's children on certain conditions, and if there were no issue, or all should die before their respective portions became payable, then a gift over. It was held that the shares given to the children of the life tenant vested immediately, though liable to be divested by all dying without issue under a certain age; and it was also held that the share of a child so dying was properly payable to its representatives.

There is nothing in the will nor in the surrounding circumstances, so far as we are able to judge from this record, that prevented the vesting of these remainders. They were subject to be divested, all or none. The divesting never has occurred and never can occur, and Henry Leiden Stevens' share in the personal property passed under his will.

I, therefore, think that the judgment should be modified, with reference to the personal property.

BARRETT and O'BRIEN, JJ., concurred; VAN BRUNT, P. J., and RUMSEY, J., dissented from the modification of the judgment.

RUMSEY, J. :

This action was brought for the partition of certain property, and after issue had been joined it was referred to a referee to hear and determine. After the trial by the referee an interlocutory judgment was entered fixing the shares of the property to be partitioned to which each of the respective parties to the action was entitled and directing a sale. After the entry of that judgment this motion for a new trial was made pursuant to the authority of section 1001 of the Code of Civil Procedure. Before proceeding to the examination of the questions presented by this record it is proper to call attention to what we conceive to be a serious error in practice into which the parties have fallen. The action was referred to a referee

to hear and determine, and his report was made directing the judgment to be entered. In that case the report stands as the decision of the court (Code Civ. Proc. § 1228), and by the provisions of that section the clerk was required to enter judgment upon it when its form has been settled by the referee. Although it has been deemed necessary in this department that there should be a direction of the court for the entry of the judgment, yet, when entered, it must be the one directed in the report of the referee; and the court, at Special Term, when a motion is made for leave to enter the judgment, has no power or authority to give directions which shall require the entry of a judgment substantially different from that prescribed in the report of the referee. (*Kennedy v. McKone* [No. 2], 10 App. Div. 97.) The judgment to be entered upon this report is to be reviewed in the same way as one entered upon a decision of the court, for the report has the same effect precisely as such decision. The manner in which it is to be reviewed is prescribed in section 1022 of the Code, and no authority is given to the court at Special Term to change or alter the directions given by the referee as to the entry of judgment. The application for judgment upon the report, which is made to the court at Special Term, is not for the purpose of a review of the correctness of the findings of the referee, but simply to furnish an assurance of regularity in the manner of entering the judgment and to enable all parties to know that the judgment as entered conforms to the one directed in the report. There was, therefore, no authority in the Special Term to modify the conclusions of law found by the referee so as to enter a different judgment than that directed in the report. All parties seem, however, to have acceded to this practice and appear without objection before the court, and no motion has been made to set aside the judgment for irregularity; and for that reason it is not necessary to further consider the point of practice.

The action was brought to partition not only certain real estate situate in the State of New York, but also other real estate in the State of Rhode Island, and certain personal property. The real estate in the State of Rhode Island was by consent withdrawn from the purview of the action, and no judgment was had concerning it, the only property which is now involved in the litigation being the real estate in this city and the personal property. The real estate

belonged to Paran Stevens, who, on the 29th of April, 1863, conveyed it to Charles G. Stevens upon certain trusts. These trusts were to receive the rents and profits, and after payment of certain expenses to pay the remainder of the income to Marietta Stevens, the wife of Paran Stevens, during her life, and upon her death, if Paran Stevens survived her, to pay the income to him, and "upon the death of the survivor of the said Paran Stevens and Marietta Stevens to convey the said lands and premises to the children of the said Paran Stevens in fee, the issue of any child of the said Paran who shall have died leaving issue living at the death of the survivor of the said Paran and Marietta, to take the same share the parent would if living." At the time of making the deed there were living three children of Paran Stevens. Marietta Stevens survived her husband Paran. Before the death of Marietta Stevens, Henry L. Stevens, one of the children of Paran Stevens, died without issue, leaving, however, a will by which he devised all his property, including, of course, whatever interest he may have had in this real estate, to a trustee, in trust for his sister, Mary Paget, who claimed, by virtue of this devise, to be entitled to one-third of this estate after the death of her mother, Marietta Stevens. The defendant Ellen S. Melcher claimed, on the contrary, that by the terms of the deed no title to the land vested in any of the children during the lifetime of Marietta, but that it was the duty of the trustee, at the determination of the life estate, to convey the land to those persons who at that time should answer the description of children of Paran Stevens; and that as such persons were only Mary Paget and herself, each of them was entitled to one-half of said premises and Mary Paget took nothing under the deed of Henry Leiden Stevens. The plaintiffs' contention was adopted by the referee, but upon the hearing at Special Term his conclusions were modified by the court and judgment was entered in accordance with the claim made by the defendant; and the question presented upon this branch of the case is whether the judgment as thus entered was correct.

The deed contains no grant to the children of Paran Stevens. Their only right to the property arises from the direction contained in the deed that the trustee shall convey to the children of Paran Stevens in fee. The deed, then, is to be construed in accordance with the rule that, where final distribution is to be made among a



class, the benefits must be confined to those persons who constitute the class at the time when the division is directed to be made. (*Matter of Baer*, 147 N. Y. 348, and cases cited.) It is not necessary to consider the precise nature of the interest taken by the members of the class before the time for division arises. Whether the remainder be contingent, or a vested remainder in those persons who shall constitute the class at any given time, subject to be divested by the death of any one of those persons before the time for distribution arises, is a matter of no particular importance. It is sufficient for the purposes of this case to say that the general rule is well established that the property when divided is to go to those persons who shall compose the class at the time when the division is to be made. (*Clark v. Cammann*, 14 App. Div. 127; *Geisse v. Bunce*, 23 id. 289.) That this rule should be applied in the case at bar is made the more manifest from the words of the deed which immediately follow those above quoted and which direct the grantee, if there shall be no issue of Paran at the time of the death of the survivor of the persons entitled to the income for life, to convey the land to the heirs at law of Paran Stevens, thus clearly indicating the intention of the grantor that no child should take under the deed so long as either of those entitled should live. Many exceptions to this rule are reported in the books, but an examination of each one of them will show that the rule itself has not been overthrown or attacked, but that the exception in each case is based upon particular circumstances, and an intention that the general rule should not control was inferred, either because there was an express gift to the persons who were to share after the determination of the life estate, so that the share of each one of them was vested at the time of the testator's death, or there were such expressions of intention in the will that it necessarily followed that the persons constituting the class took a vested interest at the death of the testator. It is not necessary to cite the numerous cases showing this exception. As indicating the reasons upon which the exception is based, we may cite the cases of *Goebel v. Wolf* (113 N. Y. 405); *Campbell v. Stokes* (142 id. 23), and *Smith v. Edwards* (88 id. 92). The last case, although applying the rule to the will therein construed, contains a discussion of the whole subject, showing the reasons on account of which an exception to the general rule may be said to exist in any particular case. But in

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this case we look in vain for any expression in the deed from which it can be claimed that this estate is taken out of the general rule laid down in the cases first cited above. The rule, therefore, must apply, and it requires us to conclude that the construction placed upon the deed by the learned referee was not correct, but that the judgment as modified at the Special Term properly fixed the interests of the parties who were entitled to this estate in remainder — if it may be so called — and properly gave one-half of the estate to the plaintiff and the other to the defendant Ellen S. Melcher.

The action was brought not only for the partition of this real estate, but for the division of certain personal property which Paran Stevens had bequeathed to his wife for her life, and to certain of his children after her death. The question presented is practically the same as that presented upon the construction of the deed, although it arises in a different manner and upon a consideration of an entirely different phraseology and requires separate examination. By the 3d and 4th clauses of his will Paran Stevens gave to his wife, Marietta Stevens, for her life, certain personal property which is the subject of this action. At the time of his death he left three children, one of whom, Henry Leiden Stevens, died before the death of Marietta Stevens, as stated above. The will provided as follows: "Upon the decease of my said wife, the property by this and the preceding clause devised, shall belong to my children, the descendants of any deceased child to take the share their parent would have taken if living; and, if no descendants of mine survive my said wife, then said property shall belong and be delivered over by my executors to the same persons named as residuary legatees in case of such failure of descendants, in the next clause of this will, and in the same proportions." The words "shall belong" in this bequest operate as a direct gift to the children of Paran Stevens. The presumption in such cases is that the testator intends that such a gift shall take effect either in enjoyment or interest at the date of his death, and such words will be construed as relating to the time of his death unless a contrary intention appears. (*Nelson v. Russell*, 135 N. Y. 137.) The effect of this bequest, therefore, would be to give an indefeasible vested remainder in the personal property to each one of the children of Paran Stevens who answered that description at the time of his death, unless a con-

trary intention is made to appear in the will, and, if that appears, it is the duty of the court to carry it into effect. (Gen. Laws, chap. 46, § 205; Laws of 1896, chap. 547.) An examination of the will makes it quite clear, we think, that such an intention does appear. The very words of the bequest over necessarily include such an intention. The bequest is to the children and the descendants of any deceased children, and it is followed by a provision that if no descendants of his survive his wife, the property shall go over to those "relatives" who are entitled to the residue under the will. It is quite clear from this that the testator intended that the only persons who should be benefited by that provision were those of his relatives of the various classes named who should be living at the death of his wife, and that the persons who would finally be entitled to the remainder could not be determined until the death of the wife, because until she dies it cannot be known whether any of the descendants of Paran Stevens will be living at that time, and, unless they are living, the bequest to the children and their issue entirely fails. Under no circumstances could the gift to the children take effect in possession until the life estate is ended. It cannot be ascertained, therefore, at the death of any one of the children during the lifetime of Marietta whether an indefeasible interest in this property has vested in him, but that remains to be determined only when Marietta Stevens shall have died; because up to that time it is uncertain whether any descendants of the testator will survive her, and if no descendants of his survive her, then the estate over takes effect. In view of this condition of affairs there could be no vesting of an indefeasible title to the remainder of this estate so long as she lived, and the necessary result is that such title could only vest in the children or in the descendants of those children who answered that description at the time of the death of the life tenant.

It has been said that the words "shall belong" indicate an intention to give. This undoubtedly is the case, but at the same time it is worthy of notice that, where the testator makes an immediate gift to take effect in interest at the time of his death, he uses the usual words "give and bequeath;" but where he makes a gift which is not to take effect at that time, but subsequently, and upon the failure of a life estate, he uses the words "shall belong" or "are to belong." It may not be of any particular importance, and yet the use of the

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two separate phrases may be remarked upon as indicating that the testator, in the use of one set of words, had a somewhat different intention from what he had in the use of the other. It is unnecessary to consider specially all the provisions of the will of Paran Stevens, but it is sufficient to say that an examination of the will discloses a well-defined scheme on his part that his property shall go in the first instance to those who are his direct descendants, and that it is only upon the failure of direct descendants that the residuary bequest over shall take effect. This intention is evident as to the property which is given separately to each one of his three children, and in each case a devise over to the residuary legatees, who are collateral relatives only, does not take effect unless there shall be an entire failure of descendants of each of the other children. So long as there is any descendant of any child living at the time when the division must be made, that descendant takes the property, and it is only upon the entire failure of such descendants at that time that the property goes to collateral relatives. This intention is thoroughly well established in the will, and to carry it out requires the interpretation of the 4th clause which has been given in the judgment. We think, therefore, that the direction in the judgment as to the division of the personal property is correct, and that the one-third which is held by the defendant should be divided as directed therein.

The result is that the motion for a new trial should be denied, with costs to the defendant Melcher.

VAN BRUNT, P. J. :

I concur. It seems to me that it is perfectly plain that the testator intended by his will to confer upon his children a vested remainder, subject to be divested by death during the continuance of the intermediate estate.

Motion for new trial denied and interlocutory judgment modified by adjudging that the legatees under the will of Henry Leiden Stevens took one undivided third in the personal property mentioned in the 3d and 4th clauses of the will of Paran Stevens, being the share which said Henry Leiden Stevens would have taken if he had survived the life tenant, with costs to all parties to be paid out of the fund.

LIZZIE SELLERS, Respondent, v. BRIDGET DEMPSEY, Appellant,  
Impleaded with JOHN DEMPSEY and Others.

*Negligence—a servant of a janitor injured by the fall of a lift—liability of the owner of the building—duty of inspection.*

The fall of a lift, constructed less than nine months before and used in part for the removal of ashes from the upper floors of an apartment house, in consequence of the breaking of a central rope by which the car was supported, which rope, although frayed to a point in one spot, was not known to the janitor to be defective, is not, in the absence of proof that the owner of the building knew, or was chargeable with knowledge, of the condition of the rope, sufficient evidence of negligence on her part to render her liable for injuries thereby occasioned to a servant not in her employ, but in that of her janitor, while such servant was operating the lift.

The fact that ropes were placed on both sides of the lift by which it could be raised and lowered, and that one of these ropes was out of order, necessitating the servant placing herself under the car while using the other rope, and that there existed a defect in a screw bolt securing the pulley over the car at the top of the shaft, of which latter defect the owner had notice, but which, however, in no way contributed to the accident, was not considered to create any liability on the part of the owner.

APPEAL by the defendant, Bridget Dempsey, from a judgment of the Supreme Court in favor of the plaintiff, and of the defendants, John Dempsey and others, entered in the office of the clerk of the county of New York on the 13th day of April, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 7th day of April, 1897, denying the said defendant's motion for a new trial made upon the minutes.

*M. P. O'Connor*, for the appellant.

*John F. Foley*, for the respondent.

PATTERSON, J. :

This is an appeal from a judgment in favor of the plaintiff and against the defendant, Bridget Dempsey, in an action brought to recover damages for injuries claimed to have been sustained by the plaintiff through the negligence of the defendant, and from an order denying a motion for a new trial. The action was originally

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brought against Mrs. Dempsey and other defendants, who it was claimed were associated with her in the ownership of certain premises upon which the accident occurred which resulted in the plaintiff's injuries. The complaint was dismissed as to all the defendants other than Bridget Dempsey. It appeared in evidence that Mrs. Dempsey was, in a general sense, the owner of the premises referred to, and that she collected the rents thereof and had the general administration of the property. The premises consisted of an apartment or tenement house in which she employed a janitor by the name of O'Connell. It was his business to take care of the house and, as he himself testified, among other things, to collect and remove the ashes from various apartments in the building. As an appliance for the accomplishment of that purpose, there was in the building a dumb waiter used as a lift, which was operated by hand by means of two ropes; one at the right side of the car, by pulling which the car was raised, and the other at the left side, by the use of which the car was lowered. It appears that the whole of this apparatus was put new into the building in January, 1894. In September, 1894, this plaintiff was employed by the janitor as his servant and not as the servant of the defendant.

On the 14th of September, 1894, the plaintiff used the lift for the purpose of bringing down to the basement ashes from several floors of the apartment house; she stood on the basement floor; the rope on the right-hand side of the elevator was out of order and could not be used, and it had been so for about two weeks. She was, therefore, compelled to use both for pulling up and lowering the car the rope at the left side, in order to reach which it was necessary for her to put her head or some portion of her body into the elevator shaft. The car was at one of the upper stories; she leaned forward to pull the rope when the car fell and struck her on the head inflicting injuries more or less serious in their character. In addition to the two ropes mentioned, there was a third rope secured to the roof of the car, about the center of the roof, by which last-mentioned rope the car was held in place and upon which the weight of the car was sustained. That center rope passed through a pulley secured at the top of the shaft. There was a small screw bolt which was attached to the shaft, and which it was shown got worn out and loose so that it would not fit in, and that loosened the shaft. It was proven that

information of that particular defect was given to a son of the defendant, and it is quite clear that notice of it was brought home to the defendant Bridget Dempsey. The negligence attributed to the defendant is that she allowed the use on the premises of an unsafe apparatus which she furnished for the use of the tenants, the janitor and those whose business it might be to assist him in the removal of ashes from the upper stories of the house; but no other fact indicating an unsafe condition was shown than as above stated. It appeared clearly in evidence given on behalf of the plaintiff that the real cause of the fall of the elevator was not the defect above referred to, of which the defendant had notice, but was the fraying and wearing out of the center rope which broke at about three feet above the top of the elevator car, and of which condition of that rope not even the janitor knew until after the accident. The testimony as to that is very plain. The plaintiff was not the servant of the defendant, but was the servant of O'Connell, the janitor. Hence the defendant did not owe to the plaintiff that duty which a master would owe to a servant, but she did owe to the plaintiff the exercise of ordinary care and prudence in the management of her property, which included the duty of maintaining the property in such reasonable repair and good condition as a person of ordinary care and prudence would exercise with reference to the uses of the property and the circumstances under which it was enjoyed and used by the tenants or servants employed in the house. She owed the duty to keep this appliance in such repair that persons rightfully using it on the premises would be reasonably safe there. If the appliance fell into bad condition, the duty to repair or make it safe arose when notice of its condition was given or might be imputed to the defendant. It was shown that the elevator was out of order, but it was also clearly shown that the accident was not in any way caused by the only defective condition of which the defendant had notice. That defect, it was proven, had nothing whatever to do with the fall of the elevator. At the close of the plaintiff's case the defendant moved for a nonsuit on that ground. The motion should have been granted. There was not a word of proof to show that the defendant knew, or had notice, or could be chargeable with knowledge, of the condition of the center rope. The breaking of that rope was the sole cause of the accident. The only thing of which the defend-

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ant had notice was the want of the bolt on the sheave that raised and lowered the elevator. That had nothing to do with the breaking of the central rope which sustained the weight of the car. As said before, it is entirely clear that it was the breaking of the central rope that caused the lift to fall. There was nothing to put the defendant on notice of that defect. It was the janitor's business to look after the lift and to use it. It was a mere appliance, a dumb waiter, serving the uses of an apartment house. There was no evidence to show the necessity of periodical inspections of such an apparatus. A duty of that kind resting upon the owner in this case is not shown. The evidence is insufficient to raise that question. This was not a passenger elevator, but merely a dumb waiter, operated by hand by a person standing on the floor outside the shaft in which the apparatus worked. The janitor states that the fact of this rope being frayed down to a point, he, whose duty it was to attend to the apparatus, observed for the first time after its fall. The apparatus was in his charge. "That (the rope) is what broke and what caused the elevator to fall. The absence of the bolt, which I speak of, had nothing to do with the fall. The fall was due directly to the breaking of the rope." In that state of the evidence, we think, it is apparent that the motion for nonsuit should have been granted. There was no proof to show the duty of inspection, and it was clearly proven that the lift fell from a cause unknown to the defendant and undetected by the janitor.

The judgment must, therefore, be reversed and a new trial ordered, with costs to appellant to abide event.

VAN BRUNT, P. J., INGRAHAM and McLAUGHLIN, JJ., concurred ; O'BRIEN, J., concurred in result.

Judgment reversed, new trial ordered, costs to appellant to abide event.



ALFRED GUTWILLIG, Plaintiff, v. MORRIS WIEDERMAN and Others, Respondents; WILLIAM H. SCHMOHL and Others, Composing the Firm of M. KANE & SON, Appellants, Impleaded with Others.

*Surplus moneys—damages for a breach of contract secured by a subsequent mortgage—right of the referee to determine such damages—measure of damages.*

The owner of premises in Sixteenth street in New York city conveyed them to contractors subject to an existing mortgage and agreed to take an additional mortgage for the remainder of the purchase price, and to make advances for the erection of buildings on the premises, such advances to be secured by mortgages to be given by the contractors. Two of such mortgages were given, one on the Sixteenth street property and one on premises owned by the contractors in Twelfth street, the latter being collateral to a bond conditioned that, in case the contractors should make good all damages which the grantor might sustain by reason of their failure to perform said building loan agreement or any part thereof as aforesaid, then the obligation should be void. Before the completion of the buildings the contractors failed, and the work was abandoned, and upon the foreclosure of the purchase-money mortgage on the Sixteenth street property there still remained an amount due the grantor for advances, the only security for which was the mortgage on the Twelfth street property.

Upon an appeal from the report of a referee appointed in proceedings to determine the disposition of the surplus money arising from the sale of the Twelfth street property, upon foreclosure of a prior mortgage thereon, which fund was claimed both by the assignees of the grantor holding the mortgage above mentioned and by the holders of a third and subsequent mortgage on the Twelfth street property, given to secure a debt of the contractors, it was

*Held*, that the referee in such a proceeding had power to determine the amount of the damages secured by the mortgage given to the grantor;

That the rights of the grantor of the Sixteenth street property were fixed when the contractors abandoned their contract, and that he, having lost everything by way of security except the mortgage on the Twelfth street property, could claim under that mortgage all the ascertained damage directly consequent upon the breach of the condition of the bond to which it was collateral;

That he was entitled to the surplus money arising on the sale of the Twelfth street property to the extent of the advances made by him towards the improvement of the Sixteenth street property, secured by the mortgage on the Twelfth street property.

APPEAL by the defendants and claimants, William H. Schmohl and others, composing the firm of M. Kane & Son, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the

13th day of September, 1897, confirming the report of a referee in surplus-money proceedings.

*Frank Barker*, for the appellants.

*Walter Large*, for the respondents.

PATTERSON, J. :

This is an appeal from an order confirming a referee's report in a surplus-money proceeding. The premises situated in East Twelfth street, in the city of New York, were sold under a foreclosure judgment. There were two claimants to the fund, each the owner of a mortgage on such premises. That of the claimants Schmohl and Kane was dated January 30, 1895, and was recorded the same day; that of the claimants Ames was dated February 11, 1895, and was recorded February 13, 1895. The referee reported in favor of the Ames, the junior mortgagees, upon the following state of facts: The premises in November, 1894, belonged to Wiederman & Rosenbaum. At that date Alfred Gutwillig was the owner of other premises situated in West Sixteenth street, in the city of New York, which were subject to a mortgage of \$30,000. On the day last mentioned Gutwillig and Wiederman & Rosenbaum entered into an agreement whereby the former contracted to sell and convey the Sixteenth street property to the latter for \$56,000, the purchasers to take subject to the \$30,000 mortgage, and to give in addition a purchase-money mortgage of \$26,000. Gutwillig further agreed to advance to Wiederman & Rosenbaum \$31,500 towards the construction of buildings on the Sixteenth street land, such advances to be made from time to time as the buildings progressed; and Wiederman & Rosenbaum agreed to make a further mortgage on the Sixteenth street property to secure all the advances made by Gutwillig. The Sixteenth street premises were conveyed to Wiederman & Rosenbaum pursuant to this arrangement, and they gave back a mortgage for \$26,000, and also the mortgage to secure the advances. They then began to erect buildings on the Sixteenth street land, and Gutwillig advanced to them money, under the loan agreement, amounting on July 5, 1895, to \$12,287.97. It is not disputed that the security of the mortgage for advances attached to that amount.

After that much money had been advanced, Wiederman & Rosenbaum failed in business and abandoned the work of construction. Meantime, Wiederman & Rosenbaum had given to Gutwillig the mortgage upon the Twelfth street property, in pursuance of the contract by which Gutwillig was to make advances. It was additional security for the performance by Wiederman & Rosenbaum of their covenants under that contract. The bond to which it was collateral was, among other things, conditioned upon such performance, and also that in case Wiederman & Rosenbaum "shall pay and make good to said Alfred Gutwillig any and all damage which he may sustain by reason of the failure of said Morris Wiederman and Jacob Rosenbaum to keep and perform said building loan agreement or any part thereof as aforesaid, then the above obligation to be void."

During the course of the work under the contract between Gutwillig and Wiederman & Rosenbaum, the latter became indebted to the claimants Ames upon certain promissory notes to secure which they gave the mortgage of February 11, 1895, above mentioned. On the failure of Wiederman & Rosenbaum the purchase-money mortgage on the Sixteenth street property was foreclosed, and after applying the proceeds of sale, including the surplus credited upon the mortgage for advances, there remained due from Wiederman to Gutwillig more than \$9,000 on account of such advances, no part of which has been paid. The only security to Gutwillig then remaining for that \$9,000 was the \$3,000 mortgage of January 30, 1895, on the Twelfth street property, which mortgage Gutwillig assigned to the claimants Schmohl and Kane, and under which they claim the surplus in this proceeding, that surplus arising from the foreclosure of a mortgage prior to both of those held by the claimants here. The practical question before the referee on this proceeding was whether, under this state of facts, Schmohl and Kane had any claim upon the surplus. He decided they had not, for the reason that there was no proof that Gutwillig or his assigns "sustained any damage by reason of a failure of said Morris Wiederman and Jacob Rosenbaum to keep and perform the building loan agreement or any part thereof."

Three propositions are urged in support of the referee's decision: *First*, that he had no power to determine in this proceeding a question of damages; *second*, that no damages were proven, and, *third*,

that the proper rule of damages applicable to the breach of the building loan agreement is such as to deprive the appellants here of any right to this surplus.

(1) There can be no doubt as to the power of the referee to determine the matter of damages, as that matter arises in this proceeding. The inquiry related to the existence of liens, their amount and the respective rights of the lienors. The validity of the appellants' mortgage is not disputed and its priority in point of time is incontestable. The real question is, was there an ascertained and definite amount due upon that mortgage to which the appellants were presently entitled? The mortgage itself ceased to be enforceable against the property. It had been wiped out by the foreclosure of a prior mortgage. Whatever lien existed was transferred to the surplus. If the amount were really fixed, whether it be called an amount due upon the mortgage, or liquidated damages for the breach of the agreement, makes no difference upon the question of the power of the referee. There was nothing to be tried by a jury. The existence of the lien, the amount being fixed, was the only matter involved in the investigation. That was a question with which a jury would have nothing to do, and which was, therefore, within the cognizance of the referee.

(2) But it is claimed no damages were proven. We agree with the respondent that damages could only arise from the breach of that condition of the bond which provided for the failure of the obligation to keep and perform all the terms of the building loan agreement, or any part thereof. The obligors did not perform that agreement, but abandoned it. What damage did Gutwillig sustain directly resulting from that abandonment? We must take the situation as it was and not speculate upon contingencies or possibilities. By the default of the obligors, Gutwillig lost the security of the mortgage for advances on the Sixteenth street property to the amount of \$9,000. He was under no obligation to go on and finish the buildings; he was entitled to stand on his contract and look to his securities. He could claim under the \$3,000 mortgage all ascertained damage directly consequent upon the breach of the condition of the bond. What was that? Loss of everything by way of security except his claim to the surplus on the sale of the Sixteenth street property and his right of recourse to the \$3,000 mort-

gage on the Twelfth street property. His rights were fixed when Wiederman & Rosenbaum abandoned their contract.

(3) Under such circumstances the proper measure of damages is the amount of the loss that directly and necessarily resulted from the breach of the condition of the bond. That breach was fully proven. Gutwillig was entitled to resort to his securities and to realize what he could upon them. The breach of the condition of the bond caused a loss of \$9,000, advances made by Gutwillig. We are not authorized to look beyond the situation as it was at the time of the default of Wiederman & Rosenbaum, or to speculate upon what might have happened under other possible circumstances. The full amount of damage was ascertained and liquidated when the surplus arising on the sale of the Sixteenth street property was applied in reduction of Gutwillig's advances; and so much of that amount as was secured by the mortgage on the Twelfth street property was the sum due on that mortgage and payable out of the surplus.

The order appealed from should be reversed and the matter sent back to a new referee for a rehearing, with ten dollars costs and disbursements to appellants to abide event.

BARRETT, RUMSEY and O'BRIEN, JJ., concurred.

Order reversed and matter sent back to a new referee for a rehearing, with ten dollars costs and disbursements to appellants to abide event.

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LEILA O. HENRIQUES and MARY A. MASON, Appellants, v. JOHN W. STERLING and THE CENTRAL TRUST COMPANY, as Executors and Trustees, etc., of MIRIAM A. OSBORN, Deceased, Respondents, Impleaded with Others. (Nos. 1 and 2.)

*Will—void gifts to benevolent societies—a son, the residuary devisee and legatee, precluded by the will from taking them—he takes them as heir at law—rule of construction of a will—dismissal of an action for want of prosecution.*

A testatrix left a son, who was her only heir at law, and gave by her will certain property to benevolent societies, which gifts, being in violation of the statute upon that subject, were consequently invalid. The son was named as a devisee and legatee as to some part of the residuary estate, but his right to take

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was so conditioned by the will that he could not take under the residuary clause the property thus attempted to be given to the benevolent societies.

*Held*, that the son being disqualified to take as residuary legatee, the testatrix died intestate as to such property given to the benevolent societies, and that the son took such property as her heir at law;

That, while the void provisions of a will may be resorted to for the purpose of ascertaining the intention of the testator with reference to the right of any person to take under other provisions of the will, they cannot be resorted to for the purpose of preventing the operation of the Statute of Descents and to substitute collateral for direct heirship.

A passive attitude for a year and a half, during which time the plaintiffs have shown no diligence in attempting to serve the summons upon necessary defendants whom it was possible to serve, justifies a dismissal of a complaint.

APPEAL by the plaintiffs, Leila O. Henriques and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of November, 1897, dismissing the complaint, and also from an order entered in said clerk's office on the 7th day of December, 1897, denying the plaintiff's motion to resettle or vacate the first-mentioned order, and dismissing the complaint upon the merits.

*Delos McCurdy*, for the appellants.

*John E. Parsons*, for the respondents.

PATTERSON, J. :

These are appeals by the plaintiffs from two orders made at the Special Term and they may be considered together. By the first order the complaint was dismissed on the ground that the plaintiffs had wholly and unreasonably neglected to serve or attempt to serve the summons and complaint on defendants who were necessary parties to a complete determination of the matter in controversy, and that no substantial excuse had been presented for such neglect. The contents of the affidavits used upon this motion fully justified the court in making the order appealed from, and it is unnecessary to add anything to the opinion written by Mr. Justice RUSSELL\* in deciding that motion.

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\*RUSSELL, J. :

On the 18th day of January, 1896, this action was begun by the service of a summons on one of the defendants. Within two months thereafter, for aught

The second order appealed from was made upon a denial of a motion of the plaintiffs, which, in substance, was one for relief from the order of the Special Term last considered. The second motion

that appears upon the papers before the court on this motion, that summons might have been served on all of the defendants necessary to a complete determination of this controversy by using the remedies afforded by law in case a personal service could not be obtained. On the 18th of September, 1897, the present motion was noticed for September 27, 1897, to dismiss the complaint as against the executors and trustees of the last will and testament of Miriam A. Osborn, deceased, on the ground that the plaintiffs have unreasonably neglected to serve the summons upon the three other defendants, without whose presence a complete determination of the controversy cannot be had. No substantial excuse is presented for the failure to proceed with diligence to serve these defendants, and such efforts as were made, as displayed by the answering affidavits, were neither timely nor effective. So far, therefore, as the court has an opportunity to view the situation from the moving and answering papers, a fair inference might be found that the plaintiffs do not care to press the action to trial in order to obtain the rights asked for, either because of some reasons for delaying, not apparent to the court, or because of a belief that the plaintiffs cannot succeed upon the trial. This latter inference may, perhaps, be drawn from the situation of the cause of action set forth in the amended complaint. The action concerns a large amount of property, and the complaint asks for the setting aside of the will of Mrs. Osborn and the partition of the real estate. Mrs. Osborn died in March, 1891, leaving as her sole heir at law Howell Osborn, who deceased in 1895. By the will of Howell Osborn, executed January 8, 1894, his entire estate was disposed of to persons other than the plaintiffs, and this will was duly probated, and also confirmed by judgment of this court June 11, 1897, in an action in which these plaintiffs were parties defendant, and in which the plaintiffs here were enjoined from bringing or maintaining any action or proceedings, or interposing or maintaining any defense in any action or proceeding based upon the claim that the said will was not the last will and testament of the said Howell Osborn, deceased. No suggestion was made upon the argument that any provision of the will of Howell Osborn was ineffective or void, so that any portion of his estate would go into intestacy. And thus it appears that any intestate property of Mrs. Osborn, in case her will or any part of it should be set aside or held ineffective, would go to persons other than the plaintiffs. It is the duty of the executors of Mrs. Osborn's will to proceed to settle her estate and carry out her wishes under the trust imposed upon them. It is the right of the beneficiaries under her will to receive those benefits, unless deprived by legal causes. The incubus of a litigation, maintained simply in a passive attitude for a year and a half by persons apparently not entitled in any event to a portion of her estate, should not be suffered to remain as a quasi injunction against the executors and trustees, restraining them from discharging their trusts, or as a cloud upon the rights of the beneficiaries to receive and enjoy the bounties of the testatrix. The motion to dismiss the complaint is, therefore, granted, with costs.

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was made in form for a resettlement of the first order, or to vacate and set aside that order. It becomes necessary, in disposing of the appeal from this second order, to advert to the situation of the parties and the facts which were made to appear to the court on that motion. The action was brought in partition, the plaintiffs claiming to be heirs at law of Miriam A. Osborn, deceased. Mrs. Osborn left a last will and testament, of which the defendants, John W. Sterling and the Central Trust Company of New York, were executors, and under which they were trustees. Associated with them as defendants were, among others, Henrietta Trowbridge, an infant, the Miriam Osborn Memorial Home Association and the President and Fellows of Yale College in New Haven, legatees of the testatrix. The purpose of the action evidently was to try title, as that may now be done in a partition suit under the provisions of the Code of Civil Procedure. The rights of the plaintiffs, according to the allegations of the complaint, are based altogether upon the claim that the will of Mrs. Osborn was procured by fraud and undue influence, or that some of its provisions were invalid. It appeared by the affidavits that the complaint had been dismissed because of the failure of the plaintiffs after many months of delay to serve Miss Trowbridge and the two corporations named with the summons. After the first order was made, Miss Trowbridge was served with the summons, the Osborn Memorial Association voluntarily appeared, and a gentleman connected with Yale College was served with the summons in the city of New York. There was nothing whatever to show that two of those parties could not have been served in the way in which service was eventually made upon them at any time during the interval between the beginning of the suit and the making of the original motion to dismiss the complaint, or that the voluntary appearance of the Osborn Memorial Association could not have been procured upon application during that interval. The fact of the service under such circumstances only seems to emphasize the neglect, because of which the action was dismissed. But notwithstanding that, if it had been made to appear to the court below that there were merits in the plaintiffs' cause of action, and that they had rights and interests to be protected, they should have been relieved from the consequences of the neglect upon fitting terms.



But we do not find such merits in the plaintiffs' claim as would justify a reversal of this order. The whole scheme of the plaintiffs' action is that, by reason of the alleged invalidity of Mrs. Osborn's will, she died, in reality, intestate, and that the plaintiffs are her heirs at law. It appears upon the face of the complaint that they are not her heirs at law. She left a son, Howell Osborn, her surviving, and he was her only heir at law, and the descent was cast upon him. The plaintiffs are the sisters of Mrs. Osborn. If the will were entirely invalid and void, he would take under the statute.

It is claimed, however, that the plaintiffs' action is not based exclusively upon the allegation that the whole will was invalid and void, but that there are averments contained in the amended complaint sufficient to support the action, even in case the will were valid. It is set forth in the 9th paragraph of the amended complaint that certain provisions of the will of Mrs. Osborn are illegal and in contravention of a law of this State which prohibits a person leaving a surviving child from devising or bequeathing more than one-half of her estate in trust, or otherwise, to benevolent, charitable, literary, scientific, religious or missionary societies, associations or corporations; and it is also averred that, by the terms and provisions of the pretended will of Mrs. Osborn, and notwithstanding the fact that, at the time of the alleged execution of such pretended will and at the time of her death, she had a son living, she was made by the will to devise and bequeath more than one-half of her estate in trust to benevolent societies contrary to the statute in such case made and provided. The claim is that, by virtue of that allegation of the complaint, there was an invalid disposition shown to have been made of a certain portion of her estate, which, if the will were otherwise valid, would fall into the residuary estate, and that Howell Osborn, the son, could not take under the residuary clause of the will, because, although he is therein named as a devisee and legatee of some part of the residuary estate, his right to take was made conditional upon certain things; that these conditions did not exist or were not complied with, and that, therefore, he was not able to take; and that necessarily it must follow that, he being excluded, the plaintiffs are the heirs at law entitled to take, and hence to maintain this action. The attitude of the plaintiffs, therefore, is that Howell Osborn being excluded from taking

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any of the residuary estate into which the unlawfully devised realty fell, that portion which would have passed to him but for the inhibitory provision of that residuary clause goes to the plaintiffs. This contention is not maintainable. Under the residuary clause (Howell Osborn being excluded) the whole estate by the terms of the will, if those terms were enforceable, would go, subject to certain conditions, to benevolent societies. But they cannot take, and there is intestacy, therefore, as to the portion which they are disabled from taking. The statute then vests the title to that portion. The direct heir, lineal descendant, becomes seized at the death of the ancestor. While the void provisions of a will may be resorted to for the purpose of ascertaining the intention of the testator with reference to the right of any person to take under other provisions of the will, no authority has been cited or principle suggested by which they can be resorted to for the purpose of preventing the operation of the Statute of Descents and to substitute collateral for direct heirship. There being intestacy as to the unlawfully devised realty, it descended to Howell Osborn, and the plaintiffs have no claim to it as heirs at law.

We think, therefore, that the second order appealed from was also rightly made and that both orders must be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order dismissing complaint affirmed, with costs. Order denying resettlement affirmed, with costs.

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LEILA O. HENRIQUES and MARY A. MASON, Appellants, v. MINNIE GARSON, Respondent, Impleaded with JOHN W. STERLING and THE CENTRAL TRUST COMPANY, as Executors and Trustees, etc., of MIRIAM A. OSBORN, Deceased, and Others. (No. 3.)

*Irrelevant allegations in a reply — stricken out.*

Allegations in a reply, to the effect that the executor of a will, under which a defendant claimed title to premises sought to be partitioned in the action, was a mere agent and servant of another defendant, and that his purpose in bringing an action to establish the will, which was set forth in the answer, was to prevent the trial of the partition suit on the merits, and a denial that the judgment in

the action to establish the will had any valid force or effect upon the right of the plaintiffs in respect to the property mentioned in the complaint, are properly stricken out as irrelevant.

APPEAL by the plaintiffs, Leila O. Henriques and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of November, 1897, striking out certain words of the reply of the plaintiffs to the answer of the defendant Minnie Garson as irrelevant.

*Delos McCurdy*, for the appellants.

*Thomas G. Shearman*, for the respondent.

PATTERSON, J. :

This appeal is from an order striking out parts of the plaintiffs' reply to the answer of the defendant Minnie Garson, who was one of the legatees and beneficiaries under the will of Mrs. Miriam A. Osborn, deceased. The plaintiffs, claiming to be heirs at law of Mrs. Osborn, brought an action in partition, alleging that the last will and testament left by her was invalid as having been procured by fraud and undue influence. The defendant Garson, by her answer, sets up, among other things, that the plaintiffs are not and never were the heirs at law of Miriam A. Osborn; that Mrs. Osborn's sole heir at law was Howell Osborn, then deceased; that Howell Osborn died, leaving a last will and testament, by which no provision whatever was made for the plaintiffs. The will of Howell Osborn was set forth as an exhibit to her answer and from its provisions it appeared that all of his residuary estate and property, including that which he derived from his mother, was given in trust to trustees upon certain terms, Minnie Garson being a beneficiary for life of such trust under certain conditions. In her answer the defendant Garson also sets up that the executor of the will of Howell Osborn brought an action to establish the validity of the will under a provision of the Code of Civil Procedure of the State of New York; that these plaintiffs were parties to that action; that it came on to be tried and that a verdict was rendered in favor of the plaintiff therein, the jury expressly finding that Howell Osborn's will was valid, and thereafter judgment was duly entered

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establishing the validity of the will as one both of real and personal property. The answer of the defendant Garson, therefore, denied the plaintiffs' heirship, claimed her interest in the property under the will of Howell Osborn, and set up the judgment establishing the validity of that will so as to bar the plaintiffs' claim as against her to the property sought to be partitioned in this action. Upon her motion an order was made requiring the plaintiffs to reply to that answer. Such reply was served. Among other things, it contained an allegation upon information and belief that the executor of the will of Howell Osborn was a mere agent and servant of another defendant, and that the purpose of bringing the action to establish Howell Osborn's will was to prevent the trial of this action on the merits. It also denied that the judgment had any valid force or effect upon the rights of the plaintiffs in respect to the property mentioned in the complaint. Thereupon a motion was made to strike out as irrelevant the whole of the reply, or certain portions thereof. On the decision of that motion the order appealed from was made, striking out as irrelevant or redundant so much of the reply as related to the purpose of the executor in bringing the action to establish the will of Howell Osborn, and also that portion referring to the effect or force of the judgment in that action upon the rights of the plaintiffs with respect to the property involved in this action.

The decision of the court below was right. The imputation of motives for the institution of the suit to establish the will of Howell Osborn had nothing whatever to do with the effect of that judgment. It in no way impaired the force of that judgment or its legal effect. The allegation respecting the force and effect of that judgment was altogether a mere averment of a conclusion of law. (*Kinnier v. Kinnier*, 45 N. Y. 535.) It was within the discretion of the court to strike out those allegations of the reply, they subserving no useful purpose, and we see no reason for interfering with the disposition of the motion made below.

The order must, therefore, be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

LEILA O. HENRIQUES and MARY A. MASON, Appellants, v. MINNIE GARSON, Respondent, Impleaded with JOHN W. STERLING and THE CENTRAL TRUST COMPANY, as Executors and Trustees, etc., of MIRIAM A. OSBORN, Deceased, and Others. (No. 4.)

*A reply in a partition suit which raises an issue as to who were the heirs of the person who died seized of the premises, is not frivolous.*

Where a reply to an answer, interposed in an action of partition brought by alleged heirs at law of a person who died seized of the premises, raises a question, which cannot be decided upon a mere inspection of the pleadings, as to who were the heirs at law of such decedent, judgment should not be granted thereon, as frivolous.

APPEAL by the plaintiffs, Leila O. Henriques and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of December, 1897, granting the motion of the defendant Minnie Garson for judgment upon the reply of the plaintiffs as frivolous.

*Delos McCurdy*, for the appellants.

*T. G. Shearman*, for the respondent.

PATTERSON, J.:

This is an appeal from an order granting a motion for judgment on the reply of the plaintiffs to the answer of the defendant Minnie Garson in this action. The motion was made and granted on the ground that the reply was frivolous. The plaintiffs claimed to be heirs at law of Miriam A. Osborn, the mother of Howell Osborn. Minnie Garson set up in her answer that they were not the heirs at law of Mrs. Osborn, but that her son, Howell Osborn, was. She annexed to her answer a copy of his will, through which she claimed title to the property sought to be partitioned, or some interest in it. She also alleged that it had been adjudicated in an action brought by the executor of Howell Osborn's will, to which action these plaintiffs were parties, that such will was a valid will of both real and personal property. The plaintiffs were compelled by the court to reply to that answer, and therein they denied the allegation of the answer, that they were not the heirs at law of Miriam A. Osborn;

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they also denied that the will mentioned in the defendant Garson's answer was the last will and testament of Howell Osborn, or that the same was a valid will, or that it was validly executed; and they alleged, on the contrary, that it was not validly executed, but was procured by undue influence. They also admitted the death of Howell Osborn and the bringing of the action by the executor to establish his will, and that the plaintiffs were made parties to that action and appeared therein. The foregoing are the important allegations of the reply, omitting some that were stricken out upon motion.

While it is true that this reply, or so much of it as is preserved, does not attack the validity of the judgment, it is altogether clear that it cannot be declared to be simply a frivolous pleading. It has been so frequently decided that such a pleading is one, a simple inspection of which suffices to show that it presents nothing for consideration or discussion, that it is useless to refer to authorities upon that subject. It is a question on these pleadings (and we are now speaking only of the pleadings) as to who were the heirs at law of Miriam A. Osborn; and that is a question which could not be decided properly on a motion for judgment on the ground of the frivolousness of this reply. It is one which involves argument, and it remains as a question in the case on the pleadings between the parties to this action. The question here is not as to any practical benefit the plaintiffs may acquire by continuing the litigation; it is as to the correctness of the practice in granting judgment where such an issue is open and undetermined between the parties, and for that reason we think the order made on this motion is wrong, and that it must be reversed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order reversed, with costs.

THE CENTRAL TRUST COMPANY of New York, as Substituted Trustee of the Separate Estate of ISABEL VON LINDEN, Appellant, v. GEORGE W. FOLSOM, and DANIEL MORISON, as Trustee of the Separate Estate of ISABEL VON LINDEN, Respondents.

*Payment — when a mortgagor making a payment to the attorney of the owner of the mortgage is not protected in so doing — scrivener rule.*

Where an attorney, who did not make the investment originally, and who has no direct authority to receive payment of the principal of a bond and mortgage, has received, by authority of the assignee thereof, one payment of interest, and has obtained, in some undisclosed manner, the physical possession of the bond and mortgage, but not of the assignment thereof, he has not such apparent authority to receive payment of the principal of such bond and mortgage as will protect the mortgagor in making a payment of the principal sum secured thereby to him. To justify such an inference of authority on the part of the attorney, he must have had the control of the investment from the beginning to the end.

APPEAL by the plaintiff, The Central Trust Company of New York, as substituted trustee of the separate estate of Isabel von Linden, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 10th day of April, 1897, upon the decision of the court rendered after a trial at the New York Special Term dismissing the complaint.

*Alfred J. Taylor*, for the appellant.

*Geo. V. N. Baldwin*, for the respondents.

PATTERSON, J.:

This action was brought to compel the surrender to the plaintiff of a certain bond and mortgage which, it was alleged, belonged to a trust of which the plaintiff was the trustee, and which it was claimed wrongfully came into the possession of the defendant George W. Folsom. There was no imputation of any direct or intended wrongdoing on Mr. Folsom's part. It appeared that he was the owner of the premises upon which the mortgage was a lien. Prior to July, 1883, that bond and mortgage belonged to Ada L. Sutton. In September, 1885, it was assigned by Ada L. Sutton

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(Saalfeld) to Daniel Morison, trustee of the trust mentioned in the complaint. The plaintiff is the substituted trustee of that trust. It appears in evidence that on the 1st day of May, 1886, Mr. Folsom drew a check for interest which fell due that day on the bond and mortgage; that check was drawn to the order of one Francis H. Weeks, as attorney for Ada L. Sutton. He received from Weeks in return a receipt which purported to be that of Daniel Morison, trustee, and it is conceded that that was the first intimation Mr. Folsom actually had of a change in the ownership of the bond and mortgage. During that same month of May, Mr. Folsom, desiring to pay off the mortgage, went to Weeks and paid to him the sum of \$30.15, an amount of interest, and also the sum of \$7,000, being the principal of the bond and mortgage. The check for interest was drawn to the order of Francis H. Weeks. The check for the principal was drawn to the order of Francis H. Weeks, attorney. Those checks were indorsed by Weeks and passed into his private bank account, and the money was never paid over to Morison, trustee. There can be no reasonable doubt that Mr. Folsom knew that Morison was trustee, and that the bond and mortgage belonged to him as such trustee. At the time these payments were made Weeks delivered to Mr. Folsom the bond and mortgage, and surrendered to him certain assignments thereof, *but not the particular assignment from Miss Sutton to Morison, trustee*. At the same time Folsom received a promise from Weeks to procure and deliver a satisfaction piece of the mortgage. The defense Mr. Folsom makes to the action is that he paid off the principal of the mortgage to the attorney for Morison, the trustee, and that by such payment the debt upon the bond was discharged and the mortgage satisfied in fact. This claim is based altogether upon the theory that payment to Weeks sufficed to extinguish the indebtedness on the bond and satisfy the lien of the mortgage. It is not pretended that Weeks had any direct authority to accept payment for the creditor. He had received one payment of interest and had the physical possession of the bond and mortgage. But how he got that possession is undisclosed. It is not shown that Morison intrusted it to him. It appears by Morison's testimony only that Weeks' office was the proper place at which to



pay interest. It does not appear that Weeks had the rightful possession of the securities. Morison says that all of his personal securities, as well as those belonging to the trust, were kept in a tin box belonging to him in Weeks' safe. The argument is made that because Weeks was authorized to receive interest, and also had in his possession the securities, Mr. Folsom was justified in relying upon the apparent authority of Weeks in accepting payment of the debt secured and surrendering the securities. But those two circumstances standing alone were not sufficient to justify the payment to Weeks. He was not an attorney in fact. He was not a general agent. But the payment was made to Morison's legal adviser, and the learned counsel for the defendant Folsom relies upon what has been called the "scrivener rule" and insists that it may be applied in this case to determine the right of a person paying money to rely upon the apparent authority of the one to whom the money is paid. That rule had its origin in England, where a scrivener "was a person to whom money or property was intrusted for the purpose of lending it out to others at a profit payable to his principal, but also at a commission or bonus for himself." (21 Am. & Eng. Ency. of Law, 881.) The origin and history of that rule is fully given in *Williams v. Walker* (2 Sandf. Ch. 325), where it was applied in a case presenting many features in common with the one at bar, and it was so applied to a payment made to a solicitor upon the analogy existing between solicitors and attorneys and scriveners under the English law. The rule is that where a solicitor *who makes the loan* receives the interest and has the securities in his possession at the time of payment of the principal, that principal being due, the person paying the money may rely upon the apparent authority of the attorney or solicitor to receive that money. The authority is not to be inferred only from the attorney having received interest, nor from the mere possession of the security, but it must result from the whole control of the investment, from beginning to end, by the attorney or solicitor. The lender must part with his money to the solicitor for investment and give him absolute control of the whole matter. The rule was referred to in *Smith v. Kidd* (68 N. Y. 130), but the payment was held to be ineffectual there because the attorney did not have the possession of the securities, although he originally made the loan and received the interest. In *Crane v. Gruenewald* (120

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N. Y. 274) the rule is referred to both in the opinion of the court and in the dissenting opinion. It is referred to by PARKER, J., as follows: "If a mortgagee permits an attorney *who negotiates a loan* to retain in his possession the bond and mortgage after the principal is due, and the mortgagor, with knowledge of that fact, and relying upon the apparent authority thus afforded, shall make a payment to him, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated that he had;" and PORTER, J., refers to the rule as being sufficient evidence of authority if the attorney *who negotiated the loan* is subsequently intrusted by the creditor with the possession of the bond and mortgage. So in *Doubleday v. Kress* (50 N. Y. 410) it is said that payment of the principal to *the agent who took the security or negotiated the loan for which the security was taken*, and was thereafter intrusted by the owner with its possession, is sufficient, and the payment is valid; and PECKHAM, J., states that the reason of the rule that *one who has made the loan as agent and taken the security* is authorized to receive payment when he retains possession of the security, is founded upon human experience, that the payer knows that the agent has been trusted by the payee about the same business, and he is thus given a credit with the payer. The law as applied in this state, being derived from the English rule, which had its origin in the relation of the scrivener to his client, the same elements must exist in order to protect the payer in making payment. There is no evidence whatever in this case to show that Weeks was employed by Morison to make this investment. Therefore, there is nothing to show that that confidence was reposed in him. All that appears is that one payment of interest was made to Weeks, after Morison, trustee, became the owner of the bond and mortgage, and that, when he went to pay off the mortgage, the bond and mortgage itself was in the physical possession of Weeks. *But the assignment by which the title to the bond and mortgage was vested in Morison, trustee, was not in Weeks' possession.* He did not deliver it to Folsom, and, therefore, he did not (so far as appears) have that which was the muniment of the trustee's title to the bond and mortgage.

There was a failure of proof, therefore, of material facts which it was necessary to show in order to justify Mr. Folsom in relying upon

an apparent authority possessed by Weeks to receive payment of the principal, and for that reason the judgment should be reversed and a new trial ordered, with costs to abide the event.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

INGRAHAM, J. (concurring):

I concur in the conclusion reached by Mr. Justice PATTERSON, that there should be a new trial. It is not clear from the testimony that when the defendant paid Weeks the principal of this bond and mortgage such payment was to Weeks as attorney in fact for the assignee of the mortgage. It does not appear that any statement was made at the time of the payment of the \$7,000 as to any authority of Weeks to receive the payment of the principal, or as to the circumstances connected with the possession of the bond and mortgage by Weeks. There is nothing to show that this money was paid to Weeks as attorney in fact for Morison rather than the attorney for the defendant Folsom. Weeks had been acting as attorney for both the defendant and for Morison as trustee, and it is not at all clear that the defendant Folsom did not recognize Weeks as his attorney at the time of this payment, and intrust him with the money for the purpose of paying the mortgage and procuring the necessary instruments to satisfy it of record. When the defendant called upon Weeks, Weeks produced the bond and mortgage, with the various assignments which vested the title to the mortgage in Morison as trustee. The transfer to Morison was not recorded, and the money was paid to Weeks by a check drawn to the order of Francis H. Weeks, attorney, without specifying the person for whom he was attorney, and was delivered to Weeks, with a statement from Weeks that he would cause the assignment of the mortgage to Morison to be recorded, and would procure from Morison a satisfaction piece of the mortgage, which he also agreed to have recorded, so that the mortgage could be satisfied upon the record. As to the recording of these instruments and the proper satisfaction of the mortgage upon the record, Weeks was requested by the defendant to act as defendant's attorney, and not as attorney or agent for Morison. Thus, the principle upon which a payment to an attorney

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who has possession of the securities or obligations to be satisfied binds the person for whom he assumes to act in receiving payment, would not apply. The principle upon which it has been held that a scrivener or attorney who invests money for a client, and who retains the securities or evidences of indebtedness, is presumed to be intrusted with a power to receive the principal and interest, seems to be largely based upon the implied authority granted to an attorney through whom the loan has been made, to receive the principal implied by the attorney's retaining possession of the security evidencing the indebtedness. The case upon which this doctrine rests seems to be that of *Whitlock v. Waltham* (1 Salk. 157). The facts of that case are stated as follows: "The interest of a mortgage was paid to and received by the scrivener that put out the money; the scrivener proved insolvent, and the question was, who should bear the loss?" And it was decided in that case that if the scrivener be intrusted with the custody of the bond, he may receive the interest, and, though he fails, yet the mortgagee shall bear the loss; and that is also so, if he receives the principal and deliver up the bond, for, being intrusted with the security itself, it shall be presumed he is intrusted with the power over it, and with a power to receive the principal and interest, and the rather because the giving up of the bond upon the payment of the money is a discharge thereof; otherwise if the obligee take away the bond, for then he hath no authority to receive any money. That case has been followed by a long line of authorities in England and in this country; but in every case that I have been able to discover, authority to receive payment has been inferred from the mere possession of the instrument or obligation evidencing the indebtedness only in the case of a scrivener or attorney who represented the creditor in making the loan, and where the possession of such evidence of debt was continued in the possession of such scrivener or attorney. It is not alleged that the mere possession of an instrument or obligation, payable to another, undorsed, invests the holder of such instrument with the right to receive from the obligor or debtor payment of the obligation. It is only where an agency has existed at the inception of the transaction, viz., the making of the loan, which is continued by the creditor or obligee allowing the obligation to remain in the hands of the attorney, that a debtor is entitled to presume that the original authority

to make the loan has been continued and enlarged so as to confer an authority to receive payment thereof.

The authorities cited by the respondents, holding that where the owner of property has invested a third person with the apparent title to it, any one acting in relation to the property relying upon such apparent title so conferred is protected, do not apply to this case; because those authorities are based upon the principle of estoppel, the owner being estopped from denying that the person upon whom he has conferred the apparent title to the property is the owner. Here Morison never conferred upon Weeks the apparent title to this bond and mortgage, the mortgage standing in the name of Morison as trustee, of which fact the defendant had notice. It does not appear from the record that Weeks acted as attorney for Morison, or for the estate of which Morison was trustee, in making this investment of the trust estate; nor does it appear that the possession of Weeks of this bond and mortgage was authorized by Morison, so that Weeks rightfully had possession. The mere fact that Morison's box containing the securities of the estate was left in a safe in Weeks' office was hardly of itself sufficient to show that the custody of the security was given to Weeks. The evidence failed, therefore, to bring the case within the authorities cited to show that Weeks, as attorney for the estate, had made the loan and had been allowed by the obligees to retain possession of the securities after the investment by the estate of its money.

I, therefore, concur in directing a new trial.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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KATE CULLOM, as Administratrix, etc., of HUGH CULLOM, Deceased,  
Appellant, v. JOHN McKELVEY and Others, Respondents.

*Negligence — an owner of a building is not liable for the negligence of independent contractors, employed to take it down, to their employee.*

The owner of an old building, who has contracted with independent contractors for its demolition, is not liable in damages for the death of an employee of the contractors who is killed by the collapse of the building caused by the over-weighting of one of its floors with brick through the negligence of the contractors or of their servants.

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APPEAL by the plaintiff, Kate Cullom, as administratrix, etc., of Hugh Cullom, deceased, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 21st day of January, 1897, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

*T. F. Hamilton*, for the appellant.

*H. C. Smyth*, for the respondents.

PATTERSON, J.:

The plaintiff's intestate, a laborer employed in the demolition of an old building in the city of New York, was killed by such building collapsing after some part of it was taken down. The defendant McKelvey was the owner of the premises, and he had employed the defendants Keegan and O'Keefe as contractors to do the work of tearing down the building. They were independent contractors, and the plaintiff's intestate was their servant. No relation of master and servant existed between him and the defendant McKelvey, nor did the latter, in any way, induce the plaintiff's intestate to enter upon the employment or to become engaged in the work. The cause of the fall of the building was the overweighting with brick of one of the floors; that was the result of the negligence of the contractors or of their servants. McKelvey owed the plaintiff's intestate no duty whatever. McKelvey was not doing the work, nor in charge of it. All that is testified to about his being connected with it is, that he was about the building every day. One of the witnesses did say that McKelvey was giving directions, but he immediately afterwards testified that he did not hear McKelvey give any directions. There was an entire absence of proof to connect McKelvey in any way with the subject-matter of the action so as to make him liable.

The nonsuit as to McKelvey was properly ordered, and the judgment should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

JOHN COSTELLO, an Infant, by JOHN COSTELLO, his Guardian ad Litem, Appellant, v. THE THIRD AVENUE RAILROAD COMPANY, Respondent.

*Negligence — a boy of eight killed by running into a cable car in the middle of a block — contributory negligence.*

A corporation maintaining a line of cable cars on an avenue running north and south in New York city, is not liable for the death of a boy eight years of age who, while running diagonally across the avenue at the middle of a block, toward the east side thereof, without stopping to look or listen, was struck and killed just as he stepped upon the westerly rail of the east track by a car going north which, when he started to cross the street, was in plain sight proceeding slowly behind a covered wagon, but the speed of which the gripman had suddenly accelerated after the wagon had left the track and while the gripman was looking to the east and continuing an altercation he had been holding with the driver of the wagon.

INGRAHAM and PATTERSON, JJ., dissented.

APPEAL by the plaintiff, John Costello, an infant, by John Costello, his guardian *ad litem*, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 18th day of May, 1897, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

The action was brought to recover damages for injuries sustained by the plaintiff from being run over by a cable car through the negligence of the defendant. At the time of the injury the plaintiff was about eight years old and a bright healthy boy. The accident occurred about noon on a clear day. The plaintiff left his home on the easterly side of Third avenue a few minutes before he was injured, and it was while he was returning towards his home and crossing Third avenue between Ninety-ninth and One Hundredth streets that he was run over. The car which struck the plaintiff had been going slowly north, having been obstructed by a covered wagon in front of it on the track. Prior to the accident the motorman was engaged in an altercation with the driver of the wagon, which was continued after the wagon turned off the track; and the motorman, while talking to the driver and looking towards the east, increased the speed of the car, which shot ahead and reached and struck the plaintiff just as he had placed his foot on the westerly

rail of the east or uptown track. At the time and place of the accident there was no car going south on the westerly track. At the conclusion of the evidence a motion was made to dismiss the complaint on the ground that the plaintiff was guilty of contributory negligence, which motion was granted, and from the judgment subsequently entered this appeal is taken.

*Edmund Luis Mooney*, for the appellant.

*Henry L. Scheuerman*, for the respondent.

O'BRIEN, J. :

The sole question for our consideration is as to whether or not the trial judge erred in dismissing the complaint upon the ground that the plaintiff was guilty of contributory negligence. In disposing of the motion to dismiss, the learned judge summarized the facts by saying: "The boy while running diagonally across the street, with nothing to obstruct his view, was struck by the left side of the front of the car and thrown under the left side of the car. This shows conclusively that he had not sufficient time to head off the car, and that in making the attempt he was guilty of contributory negligence." This summary, which is exact, seems to us to sustain the ruling made, but the earnest argument made against such a conclusion, and the sympathy which is excited from so serious an accident to a boy of tender years, and the different inferences which it is insisted can be drawn from the facts, have required an examination of the question with a view to determining whether, upon any inference to be fairly deduced, the little boy can be absolved from the charge of contributory negligence, as matter of law.

The rule is that only in cases where the evidence shows that the negligence of the plaintiff contributed to the injury as a proximate cause of it, is the court justified in withholding that question from the jury. In determining whether such negligence here existed, we must apply another rule, viz., that a child is called upon to exercise only that degree of care required from one of its age, and it is only the absence of such care that will be regarded as contributory negligence. What would be negligence, therefore, in an adult is not, as matter of law, negligence in a child. But, in determining in a given case whether such negligence is present or absent, where



injuries to a child are involved, its age must be considered as well as whether its own act was the proximate or only the remote cause of the injury. Although here the child was but eight years of age, it is conceded that he was a bright boy, capable of caring for himself while on the street and in crossing it. His tender age would forbid our expecting any great degree of care and prudence, yet, being *sui juris*, it must be held that he was bound to exercise some care commensurate with his age and intelligence.

Applying these rules to the facts appearing, we could only absolve the boy from the charge of contributory negligence by assuming that his running upon the track was in no sense one of the proximate causes leading to the injury; or that he was not bound to observe any care in crossing an avenue which was constantly traversed by cable cars; or that he was in no way negligent on such an avenue to start in the middle of the block on a run, with nothing to prevent his observing the car moving north at a slow rate of speed with a wagon in front of it, and, seeing the car, never abate his speed in his journey across the avenue, thus taking all chances or risks of crossing in safety. It will be observed that the witnesses all agree that the boy was running and did not stop while crossing the avenue, and we have no evidence to show whether he looked for or at the approaching car, or in what direction he was looking, nor is there any proof that he did anything in the way of care or precaution, except to run into collision with the car. He did not stop, look or listen for its approach, and we are left in doubt as to whether he really saw the car; for if he had observed it, he surely would have known of its close proximity to him and the danger which he would thereby run in crossing the track. The only inference to be drawn is that he ran heedlessly, without reference to the position of the car, across the avenue. That he stepped on the track at a time when it was impossible for him to get across and escape the car is conclusively shown, the evidence being that he was struck by the left-hand corner of the car just as he placed his foot on the first rail. Hence, the conclusion is irresistible that he was himself a contributing cause of and that he created the situation from which his injuries flowed. Upon no inference, therefore, to be drawn from the facts can we relieve the little boy from the charge of contributory negligence. True, as already stated, he was but eight years of age, and

not chargeable with any great degree of intelligence or care; but however we may minimize these, we cannot absolve him from blame. He was struck by an upbound car in the middle of the block, not as he was leaving the track, but, as said, just as he was entering upon it, the fact being that he ran right into the car and was struck just as he attempted to place his little feet on the first rail. Assuming, as we must, that there was sufficient to show that the motorman was negligent in not looking and seeing the boy, yet, if he had seen him running across in the middle of the block, he could not have concluded that, with the car so close, the boy would continue to run and attempt to cross. We think it clearly appears that, apart from the defendant's negligence, the failure to observe the slightest care or precaution of any kind on the boy's part contributed to the accident. The conclusion follows that for the injuries received the little boy was chiefly blamable, and should not be allowed to recover.

The only contrary inference suggested is that attempted to be drawn by the appellant, to the effect that when the boy started to run across the avenue the car was going slowly, and that when he reached the track the car suddenly increased its speed to full headway; and, therefore, that the little boy, with his small intelligence, committed merely an error of judgment in assuming that he had time to get across, which, it is insisted, he could have done had the car continued at the speed at which it was going when the boy started on his journey. And thus it is sought to bring the case within the principle laid down in *Fandel v. Third Avenue Railroad Co.* (15 App. Div. 426). There the accident happened, not in the middle of the block, but at or near the north crosswalk of Ninety-fifth street, and there was evidence to show "that this street car accelerated its speed after the woman stepped upon the track." If this boy had reached the track and then the car had suddenly accelerated its speed, one of the elements conspicuous in the *Fandel* case would have been present; and if, in addition, the accident had occurred at a crossing, there would be some analogy between this and the case cited, but upon the facts the two cases are entirely dissimilar. Another answer to the appellant's suggestion is, that it does not appear that the boy was calculating upon the speed of the car, but he started to run across and continued to run, regardless of the rate at which the car was going, and, instead of the car running

into him, he ran into the car. Unless, therefore, we are to hold that as to every boy who, without observing any care or precaution, is injured while crossing the tracks of a street railroad, the company is liable to compensate him for his injuries, upon the doctrine that it is an insurer, we must conclude that, upon the facts here appearing, the ruling of the trial judge in dismissing the complaint on the ground of contributory negligence was right.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., and McLAUGHLIN, J., concurred; INGRAHAM and PATTERSON, JJ., dissented.

INGRAHAM, J. (dissenting):

I cannot concur in the affirmance of this judgment. The complaint was dismissed solely upon the ground that the plaintiff was guilty of contributory negligence. There was evidence to sustain a finding that when the plaintiff started to cross the track this car was proceeding at a slow rate of speed, not faster than a man could walk; that the plaintiff started to cross the track diagonally upon a run, but that, after he started, the car, having been blocked by a wagon in front of it, suddenly accelerated its speed, and thus caught the plaintiff before he was able to get across the track, and injured him. It seems to me that, upon the question as to whether or not it was contributory negligence as a matter of law to make the attempt to cross the track, the situation as it existed when the attempt was made is a controlling consideration. If at the speed that the car was then moving it was safe to cross in front of it, it seems to me certainly a question for the jury to determine whether a person about to cross such a track in a crowded city street is bound to anticipate that the speed of the car will be suddenly accelerated without notice or warning, so that an act which is without danger under existing conditions becomes dangerous because of a change in the condition caused by the defendant. The act of crossing the street between the crosswalks is not of itself contributory negligence. It is merely a fact to be taken into account in determining whether or not the defendant was negligent. There certainly was evidence from which the jury could find that it was not negligent for the plaintiff to attempt to cross this track where he did, if the car had not increased its speed, and it seems to me equally clear that the plaintiff was not bound to assume that the speed would thus be sud-

denly increased without some sort of warning. There was evidence tending to show that the defendant's car, upon its way up Third avenue, had been stopped by a truck upon the track, so that its headway had been checked, and it was proceeding at a slow pace, about as fast as a man could walk; and it is quite apparent that as the car could not proceed on its way rapidly until this truck left the track, the plaintiff started to run across the track obliquely in front of the wagon and the car. As he got upon the track the truck was leaving the track, and the motive power was suddenly applied to the car so that it shot rapidly forward from behind the truck and struck him. A passenger in the car saw the boy as he was upon the south-bound track, some time before the power was applied to the car. The boy was then running across the track. If the motorman had been attending to his business, looking out for persons upon the track, it is quite clear that he could have seen the boy and could have delayed applying the power to the car until the boy was across the track. Instead of that, he seems to have been paying exclusive attention to the truck driver, and engaged in conversation with him, not only while he was upon the track, but after he had left it; and he then applied the motive power to the car and caused the car to shoot ahead, without looking to see if the track was clear in front of him, or whether the plaintiff was in such a position that he would be injured by the increased speed of the car. The situation, as it appeared to the plaintiff at the time he started to cross the track, was that this car was proceeding slowly, not faster than the speed with which a man could walk, with a wagon on the track, or about turning from the track between the place where he attempted to cross and the car. Was it, as a matter of law, negligent for him to attempt to cross the track in front of this wagon at this place under these circumstances? I do not think it was. Whether or not an act is negligent must be determined from a consideration of the circumstances surrounding the person injured at the time of the happening of the injury. We have here a street railway running cars at short intervals, the motive power being supplied by a cable underneath the street. This thoroughfare runs through a densely populated portion of the city and is largely used by wagons and trucks, as well as by the line of cars of the defendant's railway; and any one attempting to cross this street with a large number of the

defendant's cars and the trucks and wagons using the street, must necessarily seize such an opportunity as is presented by a temporary stoppage of vehicles; and if it were negligent for any one to attempt to cross this street when there was a car approaching, it is quite apparent that during the busy portion of the day every one would be negligent if he attempted to cross at all.

Now, this boy, in crossing the street, saw a truck upon the track and a car behind it approaching quite slowly. He took advantage of this situation to run across the track, not in front of a car rapidly approaching, but in front of a car almost at a standstill, and where, but for the sudden application of the power of the car, he would have been in perfect safety. He had a right to anticipate that the motorman of the car would use ordinary care to ascertain whether the track was free before increasing the speed of the car. He certainly was not bound to wait until the motorman and the driver of the truck had finished their conversation to see whether or not the motorman would apply the power to the car immediately upon the track being clear, without looking to see whether any one was in front of him upon the track. When the plaintiff attempted to cross, the track was clear. The car was approaching at a rate of speed which would give him ample time to cross, and there was nothing to indicate to any one that the motorman would rapidly increase the speed of the car without considering the condition of the track in front of him, or whether or not a person crossing the street was in such a position as to be injured. This is not a case where a person attempts to cross directly in front of an approaching car, and miscalculates the time which must ensue before the approaching car will reach the place where he attempts to cross; but a case where, a car approaching at a slow rate of speed, which would give the person crossing ample opportunity to cross free from danger, a person is injured because of the negligent increase of the speed of the car by the motorman. The application of a power for the propulsion of street cars, then novel in its character, so far as its use in this city is concerned, and which is much more quickly applied than the horse power formerly in use, so that a higher rate of speed is much more quickly acquired by the car, certainly calls for more care on the part of those managing the car, when it is running through a crowded thoroughfare, to avoid injuring

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persons upon the track by reason of the increased momentum when applied to a car, than was necessary under the old system ; and the fact that a person using the street does not anticipate that such increased momentum will be suddenly imparted to the car when, but for such increased momentum, there would be no danger, cannot be said to be a negligent act which would justify a court in holding that contributory negligence existed as a matter of law. Assuming the facts testified to by the plaintiff's witnesses to be true, it seems to me that the motorman, had he been looking, would have seen this boy approaching the track, and that had he waited for a moment, before applying the power to the car, the plaintiff would have crossed in safety ; but it cannot, I think, be said that any observation of the plaintiff could have caused him to suspect that this motorman would suddenly apply the power to the car so as to cause it to shoot forward from behind this truck. It does not clearly appear upon just what portion of the track the plaintiff was when he was struck by the car. Mr. Brewster, a witness for the plaintiff, states that he first saw the boy upon the south-bound track about eight feet in front of the car ; that the boy was then on a run, and that the car was then going very slow, about as fast as a person could walk. The plaintiff was thus in this position before the motorman applied the power to the car. As soon as he applied the power the witness realized the situation and at once called to the motorman, " You have struck a boy ; you have struck a child." At the time of this exclamation, when the power was applied, the child passed out of the vision of the witness, the fender or dashboard of the front platform of the car being between himself and the plaintiff. The plaintiff must therefore, have run so much in front of the car before the movement of the car increased, that he was out of sight of the witness in the car. But it is clear that the plaintiff was actually on the track when he was struck ; and it is also clear that he was struck almost immediately after the motorman applied the power to the car. Upon this condition of the testimony, it seems to me that it was a question for the jury to decide whether it was negligence for the plaintiff to attempt to cross the track in front of this slowly-moving car, when, but for a rapid acceleration of the speed of the car, he could have crossed in safety ; and whether it was negligence for the defendant so to increase the speed of the car as to run over

a person on the track, or rapidly approaching the track in order to cross it, without observing the person, and without adopting some means to avoid an accident which appeared to be imminent in case the speed of the car was so accelerated.

The case of *Fandel v. Third Avenue R. R. Co.* (15 App. Div. 426) is in point, and to affirm this judgment would be to reverse our decision in that case. It was said there in the prevailing opinion that "it was necessary for one attempting to cross the track to cross somewhat closely in front of any street car, and it was not contributory negligence, as a matter of law, to do so, unless the speed of the car was so great and its proximity so close that the pedestrian would not probably be able to escape it. As is well known, even careful persons must, in pursuance of their ordinary avocations, cross the streets of this city in front of vehicles and moving cars, and to say that to do that constituted contributory negligence, as a matter of law, would put an embargo upon the streets so far as pedestrians are concerned." And neither in the prevailing opinion nor in the dissenting opinion is that proposition of law disputed. The only ground of the dissent was that the question of the speed of the car in that case was immaterial, as there was nothing to show that the speed of the car was increased between the time that the plaintiff stepped upon the track and the time that she was struck, and nothing to show that after she stepped upon the track any action of the gripman, however prompt, could have averted the accident.

It seems to me that we have here the proof from which the jury could find that the acceleration of the speed of this car was the sole cause of the accident; that, but for such acceleration of the speed, the plaintiff could have crossed the track in safety, and that it was not negligence for a person to attempt to cross such a street where the car was so nearly at a standstill that a person walking quickly could avoid it.

Unless we are prepared to overthrow the principles established in the *Fandel* case, and which seem to have been acquiesced in by all the members of the court, I do not see how we can sustain this judgment. On the authority of that case I think this judgment should be reversed.

Judgment affirmed, with costs.

PATRICK F. LYONS, Appellant, v. THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY, Respondents.

*Abutter's action against an elevated railroad—evidence of independent sales and rentals is inadmissible—when the objection is not waived.*

In an action brought by an abutting owner against an elevated railroad in the city of New York to obtain an injunction and to recover damages, evidence, duly objected to, of the sales and rentals of property in the same street, other than that affected by the action, is inadmissible, and neither the fact that the evidence was offered, as stated by the defendant's counsel, in order to show that the plaintiff's expert was not competent to speak of values upon the street in question, or that his opinion was erroneous, nor the fact that the plaintiff himself subsequently offered similar evidence which was admitted on the same ground, prevents the plaintiff's taking advantage of his objection.

APPEAL by the plaintiff, Patrick F. Lyons, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 17th day of March, 1897, upon the report of referees.

*David McClure*, for the appellant.

*Ezra A. Tuttle*, for the respondents.

O'BRIEN, J. :

This is the usual suit for an injunction and damages affecting premises Nos. 420 and 493 Greenwich street in the city of New York. The sums awarded for fee damage were \$500 as to each property, and rental damage was allowed at the rate of \$50 a year.

Apart from the merits, we think this judgment must be reversed for errors in rulings upon evidence. The testimony of the plaintiff's expert was directed to showing the course of values in Greenwich street; and the defendants, on their own behalf, after having elicited from their expert similar testimony, asked him in addition for a statement of the price at which he had sold another and entirely different piece of property on Greenwich street in 1892. This was objected to by the plaintiff "on the ground that it is not within the issues and that it raises a collateral issue and is within the prohibition of the *Jamieson* case." The defendants' counsel then stated to the referees: "I offer this evidence, not for the purpose



of showing the value of the premises in suit, nor for the purpose of showing the course of values of the premises in suit, but for the purpose of showing that the plaintiff's expert was not a person competent to speak as to the course of values in Greenwich street, or that if competent to speak he spoke erroneously, and that his opinion of values in Greenwich street is erroneous as stated." The objection was overruled, the chairman of the referees, as a reason for the ruling, saying: "With that statement, and you having stated what your object was in putting that question, we will allow the witness to answer, upon the ground and within the limitations stated by the counsel as his reasons for putting it." Thereafter the defendants offered evidence of the actual rent paid for a piece of property in Washington street, coupled with a statement that it was done for the same reasons and subject to the same limitations as were stated in respect to the offer of the sale, and there was the same objection, ruling and exception. The defendants also put in evidence testimony as to sales and rentals of several pieces of property other than the premises in suit, to which the plaintiff did not formally interpose an objection. In rebuttal, the plaintiff introduced evidence as to the rent of a piece of property in Harrison street, which was objected to by the defendants on the ground that it was not within the issues, that it raised collateral issues and was directly within the prohibition of the *Jamieson Case* (*infra*). Whereupon the plaintiff's counsel stated that this evidence was offered for the purpose of showing that the course of fee and rental values on Harrison street had not been as stated by the defendants' expert, and not for the purpose of showing the value or course of value, either rental or fee, of the premises in suit, and also to rebut the testimony which the defendants had introduced as to sales and rentals; and with that statement of the plaintiff's counsel the referees allowed the question. This was followed by evidence of sales and rentals of several pieces of property other than the premises in suit under the same statement and subject to the same objection and exception by the defendants.

It will thus be seen that a considerable part of this record is taken up with testimony admitted over objection, which, in the case of *Jamieson v. Kings County Elevated Railway Company* (147 N. Y. 322), and in many other cases, was held to be incompetent. (*Huntington v. Attrill*, 118 N. Y. 365; *Matter of Thompson*, 127

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id. 463; *Witmark v. N. Y. El. R. R. Co.*, 149 id. 393; *Douglas v. N. Y. El. R. R. Co.*, 14 App. Div. 471; *O'Sullivan v. N. Y. El. R. R. Co.*, 20 id. 384.) The record shows that the respondents were the first to transgress the rule which inhibits the introduction of collateral issues, and that this was done against the strenuous objections of, and subject to the exceptions taken by, the plaintiff. It is true that, having fully stated and insisted upon the objection, the plaintiff subsequently permitted evidence of like character to go upon the record without objection, but this does not deprive him of the benefit of the exceptions taken, which were in no sense waived or destroyed by the failure to repeat the objection to subsequent questions calling for the same class of evidence (*Church v. Howard*, 79 N. Y. 415; *Dilleber v. Home Life Ins. Co.*, 69 id. 256); because the referees, by their ruling when the objections were first presented, had deliberately decided upon the course of the trial, and the plaintiff was justified in standing upon the exceptions already taken without being required unnecessarily to repeat the same objection and except to the same ruling with regard to the same kind of evidence when offered at a subsequent stage of the trial. Nor do we think there was any waiver by the plaintiff's introduction of the same class of evidence in an attempt to meet what had been introduced by the defendants, for, as said in *Douglas v. N. Y. Elevated R. R. Co.* (*supra*), "By introducing a particular class of evidence in his own behalf to meet his opponent's evidence of the same character, which he has in vain asked the court to keep out of the case, a party who has taken the proper objection and exception does not lose the right to insist upon appeal that the court erred in receiving such evidence in the first instance."

We think, therefore, that the evidence of independent sales and rentals introduced by the defendants under the limitations stated came directly within the rule in the *Jamieson* case, and seasonable objections and exceptions having been taken, the judgment for that reason must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

SARAH A. NORTON, Respondent, v. THE THIRD AVENUE RAILROAD  
COMPANY, Appellant.

*Negligence — right of a passenger on a street car to alight at a point made dangerous by an approaching truck — charge as to the credibility of witnesses and as to the measure of damages.*

A passenger upon a street car who has signaled it to stop at a point at which she intends to alight, but which is at that moment rendered dangerous by the proximity of an approaching truck, is entitled to a reasonable time in which to alight and to select a safe position in the street. She is not obliged to proceed on the car to some other and safer point. If, therefore, the car is started while she is in the act of alighting and she is thrown off and injured by the truck, she cannot be held to have been guilty of contributory negligence as matter of law. Where, on the trial of an action brought by the passenger against the railway corporation, the judge, after instructing the jury to discriminate between witnesses not only as to intelligence, but also as to capacity, adds: "Now, Mrs. Norton (the plaintiff) appears to be a respectable lady — down to the witnesses who are the officers of the road (the defendant)," the remark cannot be construed as a statement that the plaintiff was telling the truth and the officers of the defendant were not; nor is it necessary for the court, after charging the jury that the plaintiff has a right to recover only compensatory damages, to charge that she cannot recover vindictive damages or smart money.

APPEAL by the defendant, The Third Avenue Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of April, 1897, upon the verdict of a jury, for \$1,500, and also from an order entered in said clerk's office on the 14th day of April, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Nathan Ottinger*, for the appellant.

*Edward J. Dunphy*, for the respondent.

O'BRIEN, J. :

The plaintiff's story in substance was that she was a passenger upon one of the defendant's cars, and desiring to alight at Pearl street she gave notice of her intention; that the car stopped in response to the signal, and that while she was attempting to alight the car negligently and suddenly started, throwing her to the ground

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in front of a then moving heavily-loaded truck, which passed over and crushed her. The defendant's version was that the plaintiff had completely alighted from the car when a truck came along in such close proximity as to frighten her and drive her against the car, and that, being wedged in between the car and the truck, she was struck by the latter, thrown down and injured.

The appellant insists that the verdict was against the weight of evidence, for the reason, as claimed, that the witnesses in support of the defendant's version were more credible than those produced by the plaintiff. All that need be said with respect to this contention is, that the plaintiff was supported in the main by the testimony of one Goldman, and although his testimony was considerably shaken upon cross-examination, yet upon the main points, as to his having been present and seen the accident, his evidence remains unimpaired; and while some inconsistencies appear between the description of the accident given by him and the plaintiff, he substantially supports the plaintiff's version. Although there were more witnesses in point of numbers in favor of the defendant, it was for the jury to determine the weight and credibility to be attached to their testimony, and that question was properly submitted to them.

If the plaintiff is to be believed — and the jury have so concluded — there was evidence from which they could infer that her injuries were the proximate result of the defendant's negligence, and were not entirely due to the negligence of the truck driver. Nor do we think that upon the facts it can be held, as matter of law, that the plaintiff was guilty of contributory negligence. Upon reaching her destination she had the right to give the signal to stop the car; and if, as is now claimed, the place which she selected to get off was made dangerous by the proximity of a truck, it was all the more reason for the defendant's affording her reasonable time to alight, and enabling her to select a safe position in the street where she would not run the risk of being run down by a truck. It cannot be concluded, because the place where she endeavored to alight happened to be dangerous from the fact that the truck was approaching in close proximity to the car, that, therefore, she was bound to know the exact position of the truck and to conclude that it was dangerous to alight, and that she was obliged to proceed on the car to some other point. As she testified, it was while she was in the

act of alighting, and before an opportunity had been afforded her of stepping on the street, that the conductor gave the signal to start the car, and she was thrown off and into a position where she received her injuries from the truck.

There are numerous exceptions urged against the validity of this judgment, based upon supposed errors in the judge's charge and upon rulings admitting and excluding evidence. As to the latter, it need only be said that they were harmless. With respect to the alleged errors in the charge, there are some of them with more merit; but even as to these, which we shall endeavor briefly to point out, there is not sufficient to justify a reversal. Thus the court's charge as to the degree of care which should be exercised by the defendant's employees, and their duty while a passenger is in the act of alighting, was correct, and if the defendant had desired any qualification of the charge by a statement as to "reasonable time to alight," that suggestion should have been made to the court at the time, and is not available now upon appeal under a general exception.

A like criticism is applicable to the exception taken to the court's charge that the "defendant is liable for injuries sustained by the plaintiff, if such injuries resulted from any negligent act or omission on the part of the defendant or its servants, and were in no manner caused or contributed to by the plaintiff." As we understand it, no fault is found with this as a correct proposition of law. But it is insisted that under it the jury were permitted to find negligence upon theories other than the alleged improper starting of the car. Undoubtedly the trial judge would have confined his instruction within the suggested limits if his attention had been called to the fact that it was too general. It is conceded that the burden placed upon the plaintiff of showing absence of contributory negligence was several times stated in the charge. But because, in stating the law in other portions of the charge, the court did not in each instance refer to the element of contributory negligence, it is urged that a general exception to the charge was sufficient. What we have already said disposes of such a contention.

Again, it is claimed that the court erred in the following statement: "And your power in this case, especially to discriminate between witnesses, not only as to intelligence, but capacity, is a thing of the utmost importance, judging the testimony of each person

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from the circumstances that surround them. Now, Mrs. Norton appears to be a respectable lady — down to the witnesses who are the officers of the road.” The error claimed is that the court in effect stated that the plaintiff was telling the truth and the defendant’s witnesses were not. We do not think that the language is susceptible of that interpretation, the fair inference from it being that the court presented Mrs. Norton and the officers of the road as all respectable people, leaving it to the jury to discriminate between them as to which they would believe.

Upon the question of damages the law had been stated to the jury in different forms, and upon that subject we do not think they could have been misled. It would have been more satisfactory if the court had charged the whole of the defendant’s 14th request, which was as follows: “If you should find a verdict for the plaintiff at all, you are to award only such damages as will compensate her for the injuries she has received, and you are not to give anything by way of example, vindictive damages or smart money.” The court charged in the language of the request, except that it omitted the last sentence in regard to vindictive damages or smart money. As an abstract proposition it was a correct request and might very properly have been charged, but the omission referred to could have done no harm, for the reason that the first part of the request in plain language told the jury that the damages were to be limited to such as would be compensatory, and this was enforced by other portions of the charge in which the judge stated more than once that the amount which the plaintiff could receive was simply full compensatory damages for her injuries. There had been no claim asserted for punitive damages or smart money, and that subject had not been in any way referred to, nor was it within the issues of the case, and the court for that reason concluded that there was no propriety or advantage in placing such a question or subject before the jury just as they were about to retire. That the defendant was not injured by such refusal is evidenced by the amount of the verdict, which was moderate and into which we cannot see that the element of punitive damages or smart money entered.

We have concluded, upon an examination of this record, that we should not be justified in reversing the judgment for errors in rulings, or setting aside the verdict which, upon conflicting evidence, the

jury resolved in the plaintiff's favor. The judgment should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

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PAULINE SPERLING, Respondent, v. ADOLPH BOLL, Defendant;  
MARTHA BOLL and HELENE BONFORT, Appellants.

*Appeal — dismissed for a failure to serve the printed appeal papers — a second appeal cannot be taken, without leave — the dismissal does not affect the merits.*

Where an appeal, taken by a defendant from an order granting a new trial in an action is dismissed, upon motion, because of a failure to make timely service of the printed appeal papers, the defendant cannot thereafter, without obtaining leave of the court, serve a second notice of appeal from the same order together with a proposed case on appeal, and insist upon a hearing of the case by the Appellate Division.

The dismissal of the appeal takes the case and the parties out of court; such a dismissal does not, however, affect the merits, which may be the subject of subsequent inquiry should the case afterward come properly before the appellate court.

INGRAHAM and PATTERSON, JJ., dissented.

APPEAL by the defendants, Martha Boll and Helene Bonfort, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of December, 1897, setting aside the defendants' proposed case on appeal and all proceedings thereon.

Upon the trial the court directed a verdict for the defendants, which it subsequently set aside, and granted a new trial, and from the order thereupon entered the three defendants appealed. This appeal, upon motion and after hearing argument, was dismissed for failure to serve the printed papers within the time prescribed by the rules of practice. Thereafter, without obtaining leave, two of the defendants served another notice of appeal to this court from the same order as to which such previous appeal had been dismissed, and served a proposed case on appeal, which is the one that was set aside and stricken out by the order now appealed from.

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*Roger M. Sherman*, for the appellants,

*Simon Sultan*, for the respondent.

O'BRIEN, J. :

The single question for our determination is as to whether, after an appeal has been dismissed by this court for failure to serve a case and prosecute the appeal as required by the rules, some or all of the original appellants, without obtaining leave, can again appeal and upon serving a case insist upon its being heard. Our first impression would be that no such practice could be tolerated. But it is insisted that there is authority for such practice, and reliance is placed upon the case of *French v. Row* (77 Hun, 387) for the proposition that the dismissal of an appeal is no bar to a subsequent appeal. It was therein said: "The respondent's claim that this order cannot be reviewed on this appeal, because a former appeal was taken and dismissed by this court, cannot, we think, be sustained. In Elliott's Appellate Procedure (§ 535) it is said: 'The effect of the dismissal of an appeal is, as a general rule, to leave the case as if there had been no appeal. An order of dismissal does not preclude a second appeal.' The dismissal of an appeal for want of prosecution is not, in judgment of law, an affirmance of the judgment appealed from. (*Watson v. Husson*, 1 Duer, 242.) In that case it was in substance held that the only effect of such a dismissal was to replace the judgment in its former condition, leaving its merits still open for examination upon a second or further appeal. That case was affirmed in *Drummond v. Husson* (14 N. Y. 60), where the court said: 'A dismissal of the appeal for want of prosecution is clearly not an affirmance of the judgment. This court has decided nothing whatever in respect to the validity of the judgment.' The principle of this case was reaffirmed in *Palmer v. Foley* (71 N. Y. 106, 109). (See, also, *Kelsey v. Campbell*, 38 Barb. 238; *Blake v. Lyon & Fellows Manufacturing Co.*, 75 N. Y. 611; *Culliford v. Gadd*, 135 id. 632.)"

There is nothing, however, in that case or the authorities upon which it is based to sustain the appellants' position here, viz., that after an appeal has been dismissed a second appeal can be taken without leave and without having the appeal reinstated; or, differently



stated, that the court, having once dismissed it, is powerless to do aught except upon such second appeal to hear it. What was under discussion in *French v. Row* (*supra*) was the binding effect in the way of an adjudication of an order dismissing an appeal. It has never been claimed that such an order is binding or conclusive upon the merits, and that if the appeal, within the rules of practice, was properly presented to the court again, the court would be precluded by reason of its former action from hearing the appeal on the merits. The effect of a dismissal, however, is well expressed in a subsequent part of the section (535) of Elliott's Appellate Procedure, quoted in *French v. Row* (*supra*), to the effect that "the dismissal of the appeal takes the case and the parties out of court." It is of course competent for the court to permit a reargument of the motion to dismiss to be made and to restore the case to its original position and hear the second appeal, provided the time to appeal has not expired, and all that was formerly done was to dismiss the appeal for failure to serve the printed papers in time. While it does not appear from the opinion in *French v. Row* (*supra*), we must assume that the second appeal was properly brought on, and the question there discussed and disposed of was whether the former dismissal was *res adjudicata* upon the merits, or acted as a bar to a review on the merits. That this is the point intended by that case to be decided is evidenced by an examination of the authorities referred to. Thus, *Watson v. Husson* (1 Duer, 242) was an action for breach of an undertaking given on an appeal, and it was therein held that an averment in the complaint that the judgment was affirmed is not sustained by the admission of proof that the appeal was dismissed, and that as the answer, the sufficiency of which was in question upon demurrer, denied the affirmance of the judgment and averred the dismissal of the appeal, it was a defense. So, too, in *Drummond v. Husson* (14 N. Y. 60), which was a similar action upon an undertaking to stay execution on appeal, it was held that, by reason of the form of the undertaking, the parties thereto were not liable to pay the judgment where the appeal was dismissed. In *Palmer v. Foley* (71 N. Y. 106) the order directing a reference to ascertain the defendant's damages sustained by reason of an injunction was held to have been improperly granted where the action in which the injunction was obtained was discontinued by stipulation of the parties, and it was

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held that the liability of the sureties depended upon the terms and form of security, and that upon the facts appearing there was no breach of the statutory undertaking.

It will, therefore, be seen, without pursuing the authorities further, that the real point involved in all these cases was as to the binding effect of an order of dismissal as affecting the merits. We agree that a dismissal is not conclusive upon the merits, and if the appeal should subsequently come properly before the court there would be nothing to prevent an inquiry into the merits. This, however, is quite a different thing from taking a second appeal to the same court, without leave, and insisting that, notwithstanding the court has dismissed the appeal, it is, nevertheless, obliged to go on and hear it, because the appellant, treating the dismissal as a nullity or mere *brutum fulmen*, concludes that it has no bearing or effect upon his rights, and that, though his case has been dismissed for failure to prosecute it with diligence, he can compel the court to listen to his appeal whenever he gets ready to present it. As we have found no authority, therefore, which militates against our first impression, that such practice would be subversive of all rules and of the authority of the court to regulate the procedure therein, we cannot assent to the proposition for which the appellants contend.

The question discussed as to whether the appellants' time to appeal had been set running by the proper service upon them of the order appealed from, or by their entry of an amended order and the service of the notice of appeal, is not material or relevant for the reason that the dismissal was not upon the ground that their time to appeal had expired, but for failure to print and serve the necessary papers within the time prescribed by the rules.

We think, therefore, that the order below was right and should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., and McLAUGHLIN, J., concurred; INGRAHAM and PATTERSON, JJ., dissented.

VAN BRUNT, P. J. (concurring):

The statute permits but one appeal to be taken, and when a party has exercised that right, the statutory privilege is exhausted.

I concur, therefore, with Mr. Justice O'BRIEN.

INGRAHAM, J. (dissenting):

This action having been brought on for trial at a Trial Term of the court with a jury, at the end of the evidence the court directed a verdict for the defendants. A motion to set aside that verdict and for a new trial was granted upon the ground that the plaintiff was entitled to have the case submitted to the jury. An order upon that motion having been entered, the defendants applied to the court to have such order resettled, which application the court granted, and the order, as resettled, was entered on the 8th day of June, 1897. The defendants procured a copy of such order and served it upon the plaintiff's attorney, and with it served a notice of appeal. It seems that subsequently the plaintiff moved to dismiss that appeal upon the ground that no case had been served; and that motion coming on to be heard, the same was granted and the appeal dismissed. Subsequently the defendants served a new notice of appeal from the order granting a new trial, and with it served their proposed case on appeal; and, on motion, such proposed case and all proceedings thereon were set aside and stricken out apparently upon the ground that the second notice of appeal was irregular and unauthorized, an appeal from the order having once been taken and dismissed for lack of prosecution.

This action of the court below could only be sustained upon its appearing to the court either that no appeal was pending or that the time to serve a case had expired. It is not claimed but that the case was served in time, if, by the service of the second notice of appeal, an appeal was pending; and thus the court below decided that no appeal was pending. By section 1300 of the Code an appeal must be taken by serving upon the attorney for the adverse party, and upon the clerk with whom the judgment or order appealed from is entered, by filing it in his office, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. The notice of appeal served complied with this section of the Code, and it would seem to follow that if that appeal was irregular or improperly taken the remedy of the respondent was to apply to the appellate court to dismiss the appeal, and the court below was not justified in disregarding the notice of appeal and assuming that no appeal was taken. As long as that appeal stood undismitted it was for the court, to which the appeal

was taken, to determine whether or not the notice was regular and sufficient. It certainly never has been understood that the court from which the appeal was taken has power to determine the question as to the regularity of the appeal, and whether a notice of appeal which complies with the provisions of the Code is sufficient to render the appeal effective. As the question as to the regularity of this appeal, however, has been argued before us, it is just as well that we should now dispose of it.

The objection to the appeal apparently relied on by the court below, and which is insisted upon here, is that the appellants, having taken one appeal and that appeal having been dismissed, are precluded from again appealing, although when the second notice of appeal was served their time to appeal had not expired. Our attention is called to no section of the Code which, in terms, provides that the dismissal of an appeal prevents a new appeal from being taken.

Chapter 12 of the Code of Civil Procedure regulates appeals. Section 1294 provides that the party aggrieved may appeal in a case prescribed in the chapter, and the chapter expressly provides for an appeal from an order granting or refusing a new trial. (§ 1347.) By section 1351 it is provided that an appeal authorized by title 4 must be taken within thirty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from, and a written notice of entry thereof. Section 1354 provides for the judgment of affirmance rendered upon the appeal, and section 1361 provides that the proceedings upon an appeal, taken as prescribed in the title, are governed by the provisions of this act and of the General Rules of Practice relating to an appeal in an action. By rule 41 of the General Rules of Practice regulations for the printing and furnishing of the papers upon which an appeal is to be heard are prescribed. It is there provided that if the papers shall not be filed and served as therein provided by the party whose duty it is to do so, his opponent may move the court on three days' notice, on any motion day, for an order dismissing the appeal, or for a judgment in his favor as the case may be; that upon an appeal from non-enumerated motions, if the appellant fails to file and serve the papers as aforesaid, the respondent may then move, upon three days' notice, to dismiss the appeal.

There is no provision, either in the Code or in the General Rules of Practice, either expressly or by implication, that provides that such a dismissal of appeal shall be a bar to another appeal seasonably taken. The Code expressly gives a right to any party aggrieved to appeal from an order granting or refusing a new trial, limited only by a service of a notice of appeal within thirty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from, and a written notice of the entry thereof. A party in whose favor a judgment or order has been entered has thus the power to limit the time within which an appeal may be taken by serving upon the adverse party a copy of the judgment or order in his favor with a notice of entry thereof, but such a service is necessary to limit the time in which an appeal can be taken. When the time has not been so limited, the right to take an appeal exists until such an appeal has been taken and the questions involved have been adjudicated upon.

Is an order dismissing an appeal for failure to serve the case and exceptions, as required by the Code, such an adjudication? It seems to me clear, both upon principle and authority, that it is not. A dismissal of an appeal not involving a decision of the merits of the order appealed from cannot amount to an adjudication of the questions determined by the order or judgment so appealed from. As an illustration, take the case where notice of an appeal was served upon the attorney for the respondent and not upon the clerk, or was not signed by the attorney for the appellant, or failed to comply with all the provisions of the Code, and where, upon a motion to the appellate court, the appeal was dismissed for that reason, it would not be claimed that such a dismissal precluded the appellant from serving a new notice of appeal, provided his time to appeal had not then expired. And I cannot see in what respect a dismissal of an appeal because of the failure of the appellant to serve his case, or a failure on the part of the appellant to print the papers upon which the appeal is to be heard, within the time prescribed by the rule, should have any other effect than that of a disposition of the appeal which was then pending at the time the order of dismissal was entered.

The question as to the propriety of the judgment or order appealed from was not presented, nor was it determined. The

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question at issue in the action was not considered or disposed of. The question is analogous to that presented upon a nonsuit upon the trial of an action at law which simply disposes of that action without adjudicating upon any of the questions involved therein, so that such a nonsuit is not a bar to a new action. No provision of the Code, no rule of practice, gives to such an order dismissing an appeal any other effect than that of a mere disposition of the appeal without disposing of the merits and controversy between the appellant and respondent; and in no litigation does such a disposition of a pending question, without any adjudication upon the merits, act as a bar to a new proceeding to accomplish the same result. This precise question was presented to the late General Term of the Supreme Court in the fourth department in the case of *French v. Row* (77 Hun, 387). The question presented in that case was whether, on an appeal from a judgment, the court could consider an order made in the action striking out a portion of the amended answer. The respondent claimed that that order could not be reviewed on the appeal from the judgment because a former appeal was taken from the order and was dismissed by the General Term. The court held that such a claim could not be sustained. Judge MARTIN, writing the opinion of the court, cited with approval from Elliott's Appellate Procedure (§ 535), where it is said: "The effect of the dismissal of an appeal is, as a general rule, to leave the case as if there had been no appeal. An order of dismissal does not preclude a second appeal." And it was held that a dismissal of the appeal for want of prosecution was clearly not an affirmance of the judgment appealed from, and that the only effect of such a dismissal was to replace the judgment in its former condition, leaving its merits still open for examination upon a second or further appeal; and the case of *Watson v. Husson* (1 Duer. 242; affd. by the Court of Appeals in *Drummond v. Husson*, 14 N. Y. 60) was cited in support of that conclusion. In *Pulmer v. Foley* (71 N. Y. 106) this last case was cited with approval, and it was there held that a dismissal of an appeal was not a decision that the appellant was not entitled to the relief asked for.

Upon the dismissal of the appeal it seems to me clear that the question as to whether or not there should be a new trial was not adjudicated, and that that dismissal, therefore, is not a bar to the

appellants taking a new appeal to have that question determined, and that the only question as to the validity of this appeal is whether or not it was taken within the time allowed by law. I think it was.

By section 1294 of the Code an absolute right is given to a party aggrieved to appeal in a case provided for in chapter 12 thereof, and by section 1351, which contains the only limitation of the right to appeal from an order granting or denying a new trial, the limitation prescribed is that the appeal must be taken within thirty days after serving upon the attorney for the appellant a copy of the judgment or order appealed from and a written notice of the entry thereof. Nothing less than this formal service is sufficient to limit the time in which an appeal must be taken. The statute recognized the necessity of limiting the time within which an appeal can be taken and fixed a time after which an appeal cannot be taken. It made that limit to depend upon an affirmative act of the respondent. That act was the service of the copy of the order or judgment appealed from. The fact that the appellants procured the order to be served upon the respondent cannot be equivalent to this one act that the Legislature required should limit the right of the appellant to appeal.

It is hardly necessary to cite cases to sustain this proposition, as it rests upon the express provisions of the Code. It is only necessary, however, to say that no cases are cited in opposition to it, while it has been the uniform practice and is sustained by an unbroken line of decisions.

I think, therefore, that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied.

PATTERSON, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

CHARLES A. HESS, Respondent, v. NEW YORK PRESS COMPANY  
(LIMITED), Appellant.

*Libel — new libelous matter, not connected with the libel sued for nor inquired into, cannot be pleaded in mitigation of damages.*

Where the complaint in an action for libel alleges the publication of articles containing general charges that the plaintiff, a candidate for member of Congress, was not "a decent candidate" nor "able and clean in his private and public character," the defendant cannot, in alleged mitigation of damages, insert in its answer, for the purpose of disproving express malice and showing probable cause, new allegations made upon information derived from third parties as to the truth of which it made no inquiries and for which it does not vouch, to the effect that, prior to its publication of the libel, it was informed that the plaintiff had offered, in connection with the remission of a personal tax, to bribe a public officer, and that he had also embezzled moneys of an estate.

APPEAL by the defendant, the New York Press Company (Limited), from an order of the Supreme Court, made at the New York Special Term bearing date the 15th day of October, 1897, and entered in the office of the clerk of the county of New York, striking out portions of the amended answer as irrelevant, redundant and scandalous.

*Courtland V. Anable*, for the appellant.

*John J. Adams*, for the respondent.

O'BRIEN, J. :

The action is for libel, consisting in the publication of a series of articles concerning the plaintiff in the fall of 1896 while he was the Republican candidate for member of Congress. Some of the charges were specific in character; others, general. It is insisted that the portions of the answer stricken out were pleaded in mitigation of damages with respect to the general charges made, and were directed to showing that the defendant acted in good faith, without malice, in the belief that the assertions concerning the plaintiff were true, and that such assertions were made with probable cause. In that connection the defendant alleged that prior to the alleged libel it was informed that the plaintiff had offered, in con-



nection with the remission of a personal tax, to bribe a public officer, and that he had been guilty of embezzlement in taking some thirty or thirty-five thousand dollars of the moneys of an estate. These are the allegations which were stricken out.

The first thing to be noticed is, that these allegations are not directed to showing the truth of the specific charges, but it is in connection with the general charges that the plaintiff was not "a decent candidate," and that he was not "a man who was able and clean both in his private and his public character," etc.; that the defendant claims that it should be permitted to show that, from information received from others as to the plaintiff's conduct and character, it had probable cause for making the charges, and that they are pertinent, not only for that purpose, but as showing the absence of express malice. It would be anomaly indeed if, when one is called to answer for what, if not true, must be regarded as a gross libel, he may be permitted, by way of mitigation, to spread upon the record other and different charges, based upon information received from others, more scandalous and more serious than the original ones.

It will be noticed that nowhere in any of the causes of action set forth in the complaint is there a word with reference to the matter stricken from the answer. Nowhere is it stated in the alleged libelous articles that the plaintiff bribed or agreed to bribe a public officer to strike the name of any person from an assessment roll, or that he ever embezzled any sum of money whatsoever. Yet these latter are the facts which the defendant seeks to prove as an excuse for making other specific and general charges in no way connected with such new matter pleaded in mitigation. Moreover, the defendant expressly disclaims any intention to assert the truth of such statements or to impute to the plaintiff the conduct therein referred to. It nevertheless sets them forth in detail, and further alleges that when it published the articles it believed them to be true. We can find no warrant in reason nor under section 535 of the Code of Civil Procedure for such a course of pleading. Mitigation does not mean the pleading of facts entirely disconnected with the original libel and which would of themselves constitute a separate and distinct libel from that originally complained of, for such cannot be held either to palliate or excuse the first libel. It is the rule that, for the

purpose of disproving actual malice and proving probable cause, it is competent to show the sources from which the information was derived, provided such information bears distinctly upon the charges made; but it would be going very far, indeed, if extraneous matter could be pleaded relating to other and entirely different and distinct charges for the purpose of showing that, from information derived from others about the truth of which no inquiry was made, the defendant believed that the plaintiff was such a disreputable person that he was justified in applying to him any slanderous or opprobrious epithet of a general character. The defendant does not allege that it made any inquiry to ascertain the truth of the objectionable matter, relying, as it claims it did, upon information received from persons whom it believed to be truthful, and which, on that account, it credited. Inquiry must, undoubtedly, have changed the defendant's belief, for, though there is a statement that it believed the charges to be true when it received the information, it expressly disclaims any intention now to assert their truth.

By way of mitigating damages with respect to general charges, while considerable latitude in pleading must be allowed, it should not go to the extent of permitting an assault upon the plaintiff's character by making other and different charges of information, received from others, which were not verified or inquired into. Matter pleaded by way of mitigation should be such as tends to furnish some excuse for publishing the libel complained of, and, as said in *Hartman v. The Morning Journal Association* (46 N. Y. St. Repr. 184), "Mere belief in the truth of a publication is not sufficient to constitute good faith on the part of the publisher; he must be free from negligence as well as improper motives in making it. It is his duty to take all reasonable precaution to verify the truth of the statement and to prevent untrue and injurious publications against others." This view is enforced by the case of *Hager v. Tibbitts* (2 Abb. Pr. [N. S.] 102), wherein Judge MILLER says: "I discover no case in the books which holds that a party can shelter himself against the consequences of an alleged slander by proof that he had information from another as to the fact. In principle it never has been held a mitigation, and the enactment of the Code that both a justification and mitigating circumstances may be introduced, cannot change the principle. But why should any such

information mitigate the slander? Is it less injurious or offensive on that account? Does it, for that reason, inflict less of a stain upon the character and reputation of the person thus unlawfully assailed? Certainly not. Nor can it be any real, valid or lawful excuse to a party circulating a slanderous and defamatory charge that he had information to that effect. The reputation of an individual is sacred, and no person should assume to propagate and set afloat a charge which impugns it, on information derived from another, without first making an inquiry and investigating its truthfulness. Where he does so I think he assumes the responsibility of the truth of the charge thus made, and it is no mitigation that he obtained information from another party which he believes to be true."

We think, therefore, that the order appealed from was right and should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON and INGRAHAM, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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JOHN J. WALTON and Others, Comprising the Firm of HUNTER, WALTON & Co., Respondents, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

*New York city — purchase of supplies — when a supply is "needful for any particular purpose" and the contract exceeds \$1,000, it must be awarded upon bids submitted after public notice — several orders each less than, but together exceeding, \$1,000 are within the statute.*

The provisions of the Consolidation Act applicable to the city of New York (Laws of 1882, chap. 410, § 64), in substance requiring that municipal supplies "needful for any particular purpose," of which the several parts together shall involve an expenditure of more than \$1,000, shall be furnished to the city under contracts entered into by the appropriate heads of departments and, except where otherwise provided, shall be founded upon sealed bids or proposals submitted under a duly advertised public notice, preclude a recovery against the city by persons who, upon various days during a period of more than three months, have delivered butter (for use in, and which was actually used by, a municipal public institution), not under a contract made after public letting, but merely upon separate orders signed by the purchasing agent of the

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department of public charities and corrections, none of which orders exceeded \$500, but which, taken together, amounted to more than \$4,200.

VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

APPEAL by the defendant, The Mayor, Aldermen and Commonalty of the City of New York, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 17th day of February, 1897, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 23d day of April, 1897, denying the defendant's motion for a new trial made upon the minutes.

*W. B. Crowell*, for the appellant.

*Robert M. Boyd, Jr.*, for the respondents.

INGRAHAM, J. :

This action is brought to recover for goods sold and delivered. The complaint alleges "that between the eighth day of January, 1896, and the seventeenth day of April, 1896, the plaintiffs sold, furnished and delivered to the defendant, at its request, goods, wares and merchandise at the agreed upon price of four thousand two hundred and eighty-six dollars and fifty-six cents (\$4,286.56), which was the reasonable value thereof." There is no allegation that a necessity existed for the purchase or use of any of the materials, or that such a necessity was certified to by the head of the department who gave the order, or that the expenditure thereof was authorized by the common council, or that a contract for the purchase of materials was entered into by the appropriate head of the department, made in compliance with public notice duly advertised. The plaintiff's proof was that plaintiff furnished butter to the city on various dates between the 8th day of January, 1896, and the 17th day of April, 1896, aggregating \$4,286.56, in lots ranging from \$458.40 to \$9.35. All of this butter was delivered at Ward's island for the use of the public institutions, and the lots appear to have been delivered upon several different days during the period mentioned. The butter was delivered upon order addressed to the plaintiffs, and which read as follows (except that the amount and date differed):

"Messrs. HUNTER, WALTON & Co.,

"No. 164 Chambers Street :

"Please send via East Twenty-sixth street pier, marked 'City Asylum, Hart's Island,' and charge this department.

"2,000 pounds of butter ..... 18c.

"Ship Friday morning.

"Mark bills 'City Asylum, Hart's Island.'

"GEORGE W. WANMAKER,

"*Purchasing Agent, D. P. C. & C.*"

No other contract was made with the department of public charities, or other representatives of the city, except by the delivery of an order in form substantially like that above described, and the delivery of the goods mentioned in each order. Each particular item furnished by the plaintiffs was ordered separately. No contract to furnish this butter was made after public letting to the lowest bidder. The plaintiffs furnished the butter simply as they received the orders from Wanmaker. The defendant's counsel admitted that the purchases were properly certified to by the commissioners of public charities to the finance department, and thereupon the court directed a verdict in favor of the plaintiffs for the full amount claimed.

The defense was based upon section 64 of the Consolidation Act (Laws of 1882, chap. 410), which provides that "all contracts to be made or let for work to be done or supplies to be furnished, except as in this act otherwise provided, \* \* \* shall be made by the appropriate heads of departments, under such regulations as now exist or shall be established by ordinances of the common council. Whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the corporation, and the several parts of the said work or supply shall together involve the expenditure of more than one thousand dollars, the same shall be by contract, \* \* \* unless otherwise ordered by a vote of three-fourths of the members elected to the common council; and all contracts shall be entered into by the appropriate heads of departments, and shall, except as herein otherwise provided, be founded on sealed bids or

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proposals, made in compliance with public notice duly advertised in the *City Record*."

There was no evidence offered by the plaintiff as to any particular necessity for furnishing these supplies at any particular time; nor did it appear that it was not known when the first order was given that the city would require for the use of the inmates of the public institutions the amount of butter ordered during the months of January, February, March and April, or that any necessity existed for such splitting up in separate amounts the purchase of those supplies of butter for the institutions during the months mentioned. The action was based apparently upon the assumption that the municipal corporation (the defendant), like any private corporation, incurred indebtedness for supplies furnished by reason of an order given for the supplies and an acceptance of the supplies so ordered. The rule, however, in relation to the liability of municipal corporations for contracts made by its agents, is somewhat different from that which relates to a private corporation with general authority to make contracts and employ agents whose acts are binding upon the corporation. As was said in the case of *McDonald v. The Mayor* (68 N. Y. 27): "It is fundamental that those seeking to deal with a municipal corporation through its officials, must take great care to learn the nature and extent of their power and authority;" and the acts of public officials in making contracts with municipal corporations impose no liability upon the corporation, unless such acts come within the authority conferred upon them by law. If, therefore, this contract, made by the purchasing agent of the department of charities, was not authorized by this section of the Consolidation Act before cited, the making of the contract by the commissioner of charities, or his subordinates, imposed no obligation upon the city of New York. The statute provides that whenever any supply is needful for any particular purpose, and is furnished for the corporation, and the several parts of the said order or supply shall together involve the expenditure of more than \$1,000, "the same shall be by contract; \* \* \* and all contracts shall \* \* \* be founded on sealed bids or proposals, made in compliance with public notice duly advertised in the *City Record*."

This provision is a limitation upon the powers of the officers of a municipal corporation to make contracts which shall impose a lia-

bility upon the municipal corporation. In order that a contract for supplies furnished to the city of New York should impose a liability upon the city, the contract must be made as prescribed by the statute; and unless a contract as prescribed by the statute is made, the municipal corporation has not contracted, and it is not liable for acts done by its officers in excess of the authority conferred upon them by law. As before stated, the provision is a limitation upon the power of the department or its officers to make a contract binding upon the municipal corporation; and a contract for any supplies needful for any particular purpose furnished for the corporation, which involves the expenditure of more than \$1,000, must be founded on sealed bids or proposals, and in compliance with public notice duly advertised in the *City Record*. No contract made other than in the method prescribed by this section of the Consolidation Act is a contract of the defendant.

It is conceded that this butter was not furnished under such a contract. It was ordered from day to day, and each separate order was for less than \$1,000, but it was all of material of the same character, and the several parts together involved the expenditure of more than \$1,000. Counsel for the plaintiff claims that this supply was not for a particular purpose, but it certainly was required by the city to feed the inmates in the public institutions. If the words "for any particular purpose" do not include supplies necessary for the support of those whom the city is bound to support, I cannot understand what these words mean. The section can have no other meaning than to provide that, when supplies are to be purchased by a department of the city government for the use of the city, or to fulfill a duty imposed upon the city by law, and when the aggregate amount of supplies needed for such purposes exceeds the sum of \$1,000, they must be purchased as provided for by this section of the Consolidation Act. But if a department of the city government could order without public letting the supplies necessary for the department for each day, because each order did not exceed \$1,000, this provision would be nullified, as it is hardly probable that any department uses of any one particular material a greater amount in each day than could be purchased for the sum of \$1,000, and this provision would evidently be of no value if a department could order at its own will each day \$999 worth of each par-

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ticular kind of material. Here it appears that this department expended, in a little over three months, upwards of \$4,200 for butter alone. It also had to supply the meat, bread and other articles of food for the inmates of these asylums, clothing and fuel, and other articles necessary for the maintenance of the institutions. If the plaintiff's contention is right, every particle of supplies needed for all of these institutions could have been ordered by the commissioner at such price as he pleased, upon such terms as he pleased, of such quality as he pleased, without competition, without public letting, in violation of the Consolidation Act, simply by placing the articles needed in several orders, seeing to it that no one order exceeded \$1,000. That it was this method which the statute was intended to prevent is clear; and yet if, upon the allegation in the complaint and the proof before the court below, this contract imposed any obligation upon the city of New York, I can see no reason why the commissioner would not have had power to procure all the supplies needed for his department in the same way. But it is also claimed that the city is bound, because the supplies were furnished to the city and were used by it without objection. As stated by counsel for the plaintiff, "the city having accepted and used these goods, must pay their fair value." If the officer of this department was without power to make a contract for these supplies, it is difficult to see how he could impose a liability on the city by receiving the supplies when furnished under the void contract. The claim, however, is expressly met and negatived by the case of *McDonald v. The Mayor (supra)*, where it is said: "But the main reliance of the plaintiff is upon the proposition that the defendant having appropriated the materials of the plaintiff and used them, is bound to deal justly and to pay him the value of them;" and after an examination of the authorities upon the subject, the court in conclusion states: "The statute may not be carried further than its intention, certainly not further than its letter. Its purpose is to forbid and prevent the making of contracts by unauthorized official agents for supplies for the use of the corporation. This opinion goes no further than to hold that where a person makes a contract with the city of New York for supplies to it without the requirements of the charter being observed, he may not recover the value



thereof upon an implied liability." See, also, *Smith v. City of Newburgh* (77 N. Y. 136), in which it is said: "A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation in violation of law cannot be upheld; and where the officers of such a body fail to pursue the strict requirements of a statutory enactment under which they are acting, the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with. When this is not done, no subsequent act can make the contract effective." It may be that for some reason not disclosed on the record the contracts, although not complying with the provisions of the Consolidation Act, before cited, were legal. We may not go outside of the record to speculate as to what necessity existed. It is sufficient in the decision of this case to say that upon the record the case appears to be for supplies furnished for a particular purpose; that such supplies aggregated more than \$1,000; that a contract made without a public letting imposed no liability upon the city, and that no officer of the city, either by making such a contract or by accepting goods furnished under such a void contract, imposed any obligation upon the city. For these reasons the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BARRETT and RUMSEY, JJ., concurred; VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting):

I think this judgment should be affirmed. It is conceded that the butter for which a recovery was had was actually delivered to and used by the defendant, and was of the value claimed. The only objection made by the defendant upon the trial to the plaintiff's right to recover was, that the butter was not furnished in accordance with the provisions of section 64 of the Consolidation Act, as amended by chapter 327 of the Laws of 1893. This statute was designed to insure economy on the part of the city, and to prevent favoritism, fraud and corruption by public officials. This was the purpose and only purpose of the statute. The butter was

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furnished upon different orders and at different times, and not one of them called for more than \$500 in value. No contract was ever made for any particular quantity — an order was sent and the amount called for by the order was shipped. The defendant was under no obligation at any time to accept butter to the value of \$1,000, and the plaintiffs were under no obligation to furnish any greater quantity of butter than that called for by each order at the time sent.

Under such circumstances it cannot be said that this butter was furnished "for any particular purpose" within the true intent and meaning of the statute referred to. (*Swift v. The Mayor*, 83 N. Y. 529.) This statute was never designed to enable the city to do an act which, if done by an individual, would be dishonest.

The defendant has received and used the plaintiffs' property; it has not paid for it; it concedes that it was of the value claimed, and it also appears that a necessity existed for its use. It is not even suggested that the butter was ordered, furnished or used with the intent on the part of any one to evade the statute.

The question involved upon this appeal is to be disposed of, it seems to us, in the same manner as though each purchase of butter had been made from a different individual and without any knowledge upon the part of the various sellers that the purchases had been made of other parties; because the infirmity in the purchase depends upon the want of power in the department to make it, and the question as to the want of power is not affected by the fact that the separate purchases were made from the same individual. Each of these purchases was as distinct as though it had been made from a different party; each had no relation to the others; nor is there anything which connected them together as a continuous transaction. If these distinct purchases had been made from separate sellers there would not seem to be any violation of the statute, interpret it as broadly as you may.

We think the judgment is right and should be affirmed.

VAN BRUNT, P. J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

MARTIN FICK, an Infant, by MARY FICK, his Guardian ad Litem,  
Respondent, v. METROPOLITAN STREET RAILWAY COMPANY,  
Appellant.

*Negligence — a child run over when stepping off a street car — verdict contrary to the weight of evidence.*

In an action brought against a street railroad corporation by a boy, who, while alighting from one of the defendant's cars, was thrown under it and injured, the testimony of the plaintiff, aged nine, supported only by that of his brother, aged eight, to the effect that the driver, after stopping the car at the request of the plaintiff, started it again as the plaintiff was alighting, throwing him under the wheel, was inconsistent with statements made by the plaintiff immediately after the accident, and again about a month later upon an examination of the driver before a police magistrate upon a criminal charge, and was contradicted by several other apparently disinterested witnesses, who asserted positively that the car did not stop, but that the plaintiff jumped off without notice to the driver while the car was in motion, and, having his back to the horses, was thrown down by its momentum.

*Held*, that a verdict in favor of the plaintiff should be set aside as contrary to the weight of evidence.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 17th day of May, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 17th day of June, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*Jacob M. Guedalia*, for the respondent.

INGRAHAM, J. :

This action was brought to recover for injuries sustained by the plaintiff, an infant of the age of nine years and six months, in consequence of being run over by one of the defendant's cars. The plaintiff and his brother, about eight years of age, were passengers upon one of the defendant's cars. He went out upon the front platform of the car, and while attempting to alight was thrown under the car and received injuries which resulted in the amputation of his right leg.

The jury found a verdict for the plaintiff, and the only ground upon which the defendant seeks to reverse this verdict is that it is against the weight of evidence.

The plaintiff testified that he got on the car at Thirty-fourth street and Lexington avenue; that the car was going west; that he did not get a seat until the car passed Sixth avenue; that when the car got to Tenth avenue he went to the front platform and told the driver to stop; that his brother Henry was with him; that the driver stopped the car; that he (the plaintiff) then put his foot on the step and started to get off; that the car started in motion again and he was thrown off, was thrown upon his face and the wheel passed over his leg; that when he asked the driver to stop the car, it came to a full stop; that the car started before he got off, and threw him down. Henry Fick, the plaintiff's brother, who was with him on the car, testified that the car came to a full stop, and that he (the witness) then got off. Another witness called for the plaintiff testified that when he first saw the car it had stopped, and that it was about three yards from the plaintiff. The defendant called as a witness a physician in the employ of the defendant corporation, and who was in the hospital to which the plaintiff was taken the day after the accident. He testified that he spoke to the plaintiff then; that the plaintiff told him that he was getting off the front platform with his brother Henry; that he got off while the horses were going. This witness seems to have interviewed the plaintiff without any authority from any one, but simply in the interest of the railroad company. The accident happened on Decoration Day, May 30, 1895. It also appeared that the driver was arrested. His examination upon the criminal charge was before the police magistrate on the 28th day of June, 1895, and the plaintiff was also examined before the magistrate. The plaintiff there testified that he was on the car with his brother; that he (the brother) told the driver to stop the car; that the driver stopped, and his brother got off the car; that the car commenced to go again, when the plaintiff was hurt; that the car was turning the curve when the plaintiff went off, and that the car was going at the time that he (the plaintiff) fell. The defendant also called a witness who testified that he was in the car when the plaintiff, with his brother, got off; that the car was proceeding towards Tenth avenue, and just before arriving there

the car stopped and almost all the passengers left the car; that, after the bell rang for the car to start, the driver shut the door and that the plaintiff jumped up, went to the front door and out upon the front platform, and stepped off the car; that then came the crash or jolt of the car and the witness jumped out; that the plaintiff left his seat and stepped off the car after the car had started. He swore that, before the plaintiff attempted to get off, the car had gone at least twenty feet from the point at which it had stopped. The witness positively contradicts the statement of the plaintiff, that the car came to a stop while the plaintiff was on the platform, and then started again. The defendant also called a witness who was sitting in the house No. 501 West Thirty-fourth street, at the time of the accident, looking out of the window. This witness testified that the accident occurred nearly in front of the witness; that he saw the boy standing on the step pretty near half way down the hill; that he rode on the step a few feet when he jumped off and walked backwards a few steps when he fell and the car passed over him; that he got off the car with his back to the horses, and that the car was going at the time; that the car did not stop before he got off. This witness appears to have been entirely disinterested and in a position from which he could see the accident.

Another witness, who was a passenger on the car, and who got off just before the accident, testified that when she got off the car she walked towards the sidewalk; that when she got there she heard a scream, and that she then turned around and saw the plaintiff lying upon the street two or three feet behind the car; that the car had gone about twenty-five feet. The conductor of the car following the car in question testified that his car closely followed the car on which the plaintiff was a passenger; that just before getting to Tenth avenue the witness' car had to stop, because the car in front had stopped to allow the passengers to alight; that he saw the plaintiff attempt to get off the car; that he got off the car while it was in motion, and that as he was trying to get his footing he fell under the car; that the car ahead was close to the witness, the team of the witness' car being right up to the dashboard of the car ahead of him; that the witness' car was an open car; that the plaintiff jumped from the car, holding on to the rail upon the body of the car. The conductor of the car upon which the accident happened testified

that as he was going west through Thirty-fourth street he stopped at the top of the hill to let some passengers off; that he signaled the driver to go ahead, and that the car had gone about four houses from the top of the hill when the witness felt a jolt, looked on the side of the car and saw the plaintiff lying near the back wheel, and that the car then came to a stop; that the car did not stop at all from the time it stopped at the top of the hill until after the boy had been run over. The driver also testified that neither of the boys asked him to stop, nor did he stop the car; that the boys came upon the platform, and after riding a few feet he heard the plaintiff scream, and noticed him dragging by the body rail of the car; that when he screamed the driver put on the brake as soon as possible, but that before he could stop the car the plaintiff let go and fell under the car.

The plaintiff's case, therefore, depends entirely upon the testimony of these two boys, both of whom made statements immediately after the accident which, if not absolutely contradicting their testimony upon the stand, were at least inconsistent with it. The other witnesses to the occurrence, several of whom are apparently disinterested, testified positively that the car did not stop, but that the plaintiff jumped off while the car was in motion, with his back to the horses, holding on the rail upon the body of the car; and that the momentum caused by the motion of the car, he having his back to the horses, caused him to fall. If this is true it is quite clear that there was no negligence on the part of the defendant that caused the injury, but that it was solely caused by the act of the plaintiff in jumping from the car while it was in motion, with his face in the contrary direction from that in which the car was going, and which would necessarily result in his being thrown to the ground. The explicit statement made by the plaintiff and his brother, that the driver was asked to stop and did stop, and then started on again, when no such statement was made to the police magistrate at the time that the driver was before him, charged with negligence that resulted in the injury, when such a statement would have been most material in determining whether or not the driver was guilty, is certainly most suspicious; and it can hardly be conceived that these children would have recollected this occurrence several years after the accident when called upon to testify upon the trial of the action,

and not have remembered it within a month of the accident when called upon to testify before the police magistrate. It is hardly conceivable that, if the present statement is true, they should have made one inconsistent with it and which left out the one fact that would justify a recovery in this case.

The plaintiff and his brother were largely interested in the result of this trial. It is quite apparent that for the plaintiff to succeed it was necessary for him to swear that the car had stopped before he attempted to alight. He was a boy under ten years of age at the time of the accident, and something over twelve years of age at the time of the trial. The liability of a child of this age to be coached for his examination in court, to have the suggestion made to him that he should remember that the car stopped before he attempted to alight, and the inability of such a child to realize the obligation of an oath, or the consequences of his testifying to something not true, with the possibility of such a child's being influenced by the statements of those about him, and his liability to be easily induced to remember, or to think he remembers, a fact which he is told happened, and which he is told he must repeat upon the witness stand, should be considered in determining whether or not such a statement, unsupported by other evidence, and expressly contradicted by several witnesses who were present and saw just what did happen, is sufficient to sustain a verdict founded solely thereon. It is scarcely conceivable that this child, when asked about the occurrence upon his examination before the police magistrate, should not have stated that he asked the driver to stop or that the car did stop, if such was the fact. At that time it was not realized that it was necessary for him to testify to that fact in order to entitle him to a verdict.

The plaintiff was represented by his counsel before the police magistrate, and it is scarcely conceivable, if his counsel had been informed of the fact that the car had stopped, and that it was its sudden motion that threw the plaintiff off and caused the injury, that he would not have seen to it that such a statement was then made by the plaintiff. Yet several weeks after, when called upon to testify, he for the first time makes such a statement. The plaintiff thus being so interested in the result that his testimony is open to scrutiny, having, within a month of the injury, made a state-

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ment in a judicial proceeding which is at least inconsistent with that made upon the stand in this case, and being contradicted by every other witness who was present and saw the occurrence, it must certainly be said that there was a very strong preponderance of evidence against the plaintiff's case. To justify our granting a new trial, upon the ground that the testimony was against the weight of evidence, it must appear from the whole testimony that the statement of the plaintiff was so overborne by the contrary evidence as to satisfy us that the verdict of the jury was not really based upon a fair consideration of the testimony, but was induced by some other feeling or consideration. This, I think, is such a case. Here there was really no evidence to sustain this verdict, except the evidence of the plaintiff, corroborated to some extent by his brother, both of them children under ten years of age. This statement, while not in itself impossible, is somewhat improbable. It is contradicted by their own statement made when the occurrence was fresh in their memory. It is contradicted by the sworn testimony of every witness to the injury who was called and examined; and then we have the fact of the age of the plaintiff and his brother, and, under the circumstances, the extreme probability that their statement was influenced or controlled by those of more mature years about them when it was realized that this fact must be sworn to to enable the plaintiff to recover.

Upon the whole case I think that this verdict was so much against the weight of evidence that it is our duty to reverse the judgment and order a new trial, with costs to appellant to abide event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.



SYDENHAM KELLY, Respondent, v. CAROLINE J. ERNEST, Appellant.

*Counterclaim — when it states, with sufficient certainty, the purpose of a payment — the sufficiency of facts should be raised by demurrer, not by motion.*

In an action upon an account stated, in which the defendant interposes a general denial to the complaint, and also alleges, by way of counterclaim, that after he had made a contract with the plaintiff for the performance of certain work for a fixed sum, he paid the plaintiff a certain sum, in addition to that of which the plaintiff admitted the receipt, to induce him to perform the work which he subsequently failed to perform, to the damage of the defendant, the answer sufficiently states the purpose of the payment and its voluntary character, and an order requiring the defendant to make his answer more definite and certain by stating whether the alleged payment was made on account of the work done under the contract or for what other purpose, is improperly granted.

The sufficiency of facts, pleaded as a defense, should be raised by demurrer or upon the trial, and not by a motion to strike out the defense.

APPEAL by the defendant, Caroline J. Ernest, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of November, 1897, as resettled by an order entered in said clerk's office on the 2d day of December, 1897, requiring the defendant to make the answer more definite and certain, and to strike therefrom irrelevant matter.

*James W. Hyde*, for the appellant.

*James H. Marsh*, for the respondent.

INGRAHAM, J. :

We think that this order should be reversed. The complaint is upon an account stated. The answer denies each and every allegation of the complaint, and as a separate and further defense, and as a counterclaim, alleges the making of a contract between the plaintiff and the defendant, whereby the plaintiff was to do certain work for the defendant for the sum of \$425; that in addition to the amount admitted by the plaintiff to have been received from the defendant, the defendant paid him the sum of \$190 in order to induce the plaintiff to finish the work, and that the plaintiff, notwithstanding the receipt of the amount of money, has failed to complete the work,

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to defendant's damage in the sum of \$150, for which the defendant demands judgment.

This paragraph of the answer alleges the payment of \$190 as a sum of money in addition to that required by the contract, and as a voluntary payment to induce the plaintiff to continue his work and to perform his contract. The order appealed from requires it to be made more definite and certain by stating whether the alleged payment of \$190 was made on account of the work done under the contract, or for what other purpose. The paragraph alleges that it was made to induce the plaintiff to continue the work, although not required to be made by the contract, and is just what the order directs it to be. It appears to be as definite as possible, as a payment to the plaintiff, not made under the contract, but as an additional payment for the work to be done, voluntary in its nature.

Nor should the court have stricken out the 3d defense. It is not alleged that the facts are not true. The sufficiency of a fact pleaded as a defense should be raised by demurrer or upon the trial, and not by a motion to strike out.

The order appealed from is reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs to abide event.

VAN BRUNT, P. J., BARRETT, PATTERSON and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs to abide event.

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EDWARD W. BACKUS and JOHN H. ROWE, Appellants, v. THE EXCHANGE FIRE INSURANCE COMPANY of the City of New York, Respondent.

*Fire insurance policy — notice of its cancellation by the insurer — an offer in the notice to return the unearned premium on surrender of the policy is sufficient, without an actual tender thereof.*

Where a policy of fire insurance provides that the insurer may cancel it upon five days' notice to the insured, and that if it be so canceled any unearned portion of the premium actually paid shall be returned to the insured upon the surren-

der of the policy or of its last renewal, an actual and formal tender of the unearned premium by the company, at the time of service of the notice, is not essential to a cancellation of the policy on its part, where the notice states that such unearned premium will be paid when the surrender is made.\*

APPEAL by the plaintiffs, Edward W. Backus and another, from a judgment of the Supreme Court in favor of the defendant bearing date the 30th day of June, 1897, and entered in the office of the clerk of the county of New York upon the decision of the court rendered after a trial before the court without a jury at the New York Trial Term.

This action was brought to recover the amount of a policy of fire insurance issued by the defendant, dated November 2, 1892, and having one year to run, upon property owned by the plaintiffs which was destroyed by fire in September, 1893.

*E. V. Slauson*, for the appellants.

*Michael H. Cardozo*, for the respondent.

INGRAHAM, J. :

This case was brought on for trial at a Trial Term of the court, a jury having been waived, upon a stipulation as to the facts, and judgment was directed for the defendant. The parties agree that the only question at issue is the construction of the provision in the policy relating to a cancellation thereof, and state the question to be as follows: "The plaintiffs claim that said policy was not canceled by the defendant by the service of said notice on the plaintiffs, for the reason that same was not accompanied by payment or tender to the plaintiffs of the unearned premium thereof. The defendant claims that said policy was legally canceled by said notice without payment or tender of said unearned premium, and that it was the duty of the plaintiffs after receiving said notice to surrender or offer to surrender said policy to the defendant, and demand payment of said unearned premium, if the plaintiffs desired to obtain the same." The provision in the policy referred to provides that the policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. "If this policy shall be canceled as hereinbefore pro-

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\* See *Tisdell v. New Hampshire Fire Ins. Co.* (155 N. Y. 163).—[REp.]

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vided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice, it shall retain only the *pro rata premium*." The policy was issued on the 2d day of November, 1892, and on the 15th day of July, 1893, the defendant posted a letter to the plaintiffs, which was received by the plaintiffs on the 17th day of July, 1893, which says: "The Exchange Fire Insurance Company of New York herewith gives five days' notice of its intention to cancel policy No. 316,627, issued to E. W. Backus & Co. owner, and — mortgagee, for \$2,500, location at Minneapolis, Minn., in accordance with the stipulations and provisions embraced in lines Nos. 51 to 55, both inclusive, of the printed conditions of said policy, to wit." The clause of the policy is then quoted and the notice continues as follows: "Please take special notice that all liability of said Exchange Fire Insurance Company, under said policy, will absolutely cease at noon July 20, 1893, unless surrender thereof to said company be sooner made, and the *pro rata* unearned premium thereon will be paid upon proper demand and surrender of policy."

No demand was made upon the insurance company for this premium, nor was the policy or last renewal ever surrendered, nor did the company make any further tender of the unearned premium mentioned in this letter. No point is made by the appellants of the sufficiency of this notice to cancel the policy, or of the sufficiency of this letter as a notice that the defendant intended to exercise its option that the policy should be canceled. The only claim made is that an actual or a formal tender of the unearned premium was essential to the cancellation of the policy by the company. The clause in the policy provides that it may be canceled at any time by the company by giving five days' notice of such cancellation.

This notice by the company to the plaintiffs did give five days' notice of the cancellation, and, under the provisions of the policy, by such notice the policy was canceled. The further provision, that the unearned portion of the premium should be returned on surrender of the policy or last renewal, did not require the repayment of the unearned premium as a condition precedent to the cancella-

tion of the policy. The *pro rata* premium was only to be returned on surrender of the policy or last renewal. That surrender of the policy was an act to be performed by the insured. It cannot be enforced by the insurance company, as it is in the possession of the insured. All that the defendant could do was to notify the insured that the policy was canceled and offer to pay the *pro rata* unearned premium upon the surrender of the policy. It then became the duty of the insured to offer to surrender the policy or last renewal, and then the obligation of the insurance company to pay the *pro rata* premium would arise. If a surrender of the policy had been tendered by the insured and the insurance company had then refused to pay the *pro rata* unearned premium, it might be that the obligation of the company under the policy would revive and the policy continue in force, but, under the form of this clause providing for the cancellation, it seems to me quite clear that the policy was canceled by a service of the notice with an offer then to return the *pro rata* unearned premium upon the surrender of the policy.

The case of *Waltheur v. Pennsylvania Fire Ins. Co.* (2 App. Div. 330) is in point, and the reason given by the court in that case to show that the case of *Nitch v. Am. Cent. Ins. Co.* (83 Hun, 614; affd. by the Court of Appeals, 152 N. Y. 635) is distinguishable applies as well to this case as to the *Waltheur* case. In the latter case the court say: "The distinction, therefore, between this and the *Nitsch* case will be found in the fact, which we have adverted to, that there was in that case no return or offer to return the premium, while in this case there was a distinct offer." In the case at bar it will be noticed that there was a distinct offer to repay the *pro rata* unearned premium upon demand and surrender of the policy, and this case is, therefore, brought directly within the decision of the *Waltheur* case.

We think that the judgment was right, and it is affirmed, with costs.

VAN BRUNT, P. J., BARRETT, PATTERSON and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

ANNETTE B. MARKOE, Respondent, v. TIFFANY & Co., Appellant.

*Bailment — delivery to the husband of the bailor — liability therefor.*

Where a wife deposits goods and takes therefor a receipt, which states that "the receipt must be returned on delivery of the goods;" and the bailee thereafter, without requiring the return of the receipt, delivers the goods to her husband, the wife is entitled to recover the value of the goods at the date of a demand therefor by her, and she is not limited in her recovery to the lowest estimate of the value of the articles as testified to by an expert called by her.

In such a case there exists a presumption that the goods belonged to the wife. *It seems*, that in such a case it is not error for the court to charge, in an action brought by the wife against the bailee to recover the value of the goods, that the act of the bailee in delivering the goods to the husband constituted a conversion.

*Quare*, whether presents given to a husband and wife, left in the possession of the wife, and by her deposited for safe-keeping, may be properly delivered by the bailee to the husband.

APPEAL by the defendant, Tiffany & Co., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of April, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 6th day of April, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Charles E. Miller*, for the appellant.

*Flamen B. Candler*, for the respondent.

INGRAHAM, J. :

The plaintiff deposited with the defendant for safe-keeping a trunk which contained silverware and other articles of value, for the storage and insurance of which the plaintiff was to pay a premium or charge, the amount of which was fixed at thirty-six dollars per year. The defendant issued to her a receipt acknowledging the receipt of the trunk, contents unknown, left with it for safe-keeping, and to be redelivered on surrender of the receipt. By that receipt the defendant also agreed to insure the plaintiff, her executors, administrators or assigns, to the amount of \$3,000 against loss of, or damage to, the said package and contents by fire or burglary, and this receipt contained the following provision: "This receipt must

be returned on delivery of the goods, and all liability under this receipt shall cease on the delivery of such package and contents to the holder hereof." The receipt was delivered to the plaintiff when the trunk was received by the defendant's agent, inclosed in a letter which was signed "Tiffany & Co. McKinley," and which stated that the charge for the caring of the trunk would be thirty-six dollars a year. The receipt was retained by the plaintiff from the date of its delivery, on April 17, 1889. It appeared that the plaintiff, then the wife of William B. Wetmore, subsequently obtained a divorce from him. The plaintiff testified to the contents of this trunk, describing each of the articles therein contained. Some of the articles were purchased by the plaintiff herself, and some of them were wedding presents. As to those articles which the plaintiff herself purchased, she described them and stated the cost; and as to those articles which were presented to her, she particularly described them, and their value was testified to by an expert. There is no evidence tending to contradict the plaintiff's witness as to the value of the goods, or to contradict the description of the goods given by the plaintiff. The plaintiff further testified that in the first week of May, 1889, two or three weeks after they were delivered to the defendant, she presented the receipt and asked for her trunk, which had been delivered to defendant; that she then saw Mr. McKinley, the same agent that had written the letter and signed and transmitted the receipt to her; that, in answer to that demand, McKinley said, "I don't understand this at all; that trunk was delivered on the 27th of April." The witness asked to whom it was delivered, and McKinley said that he regretted that he could not give it to her, and it never has been delivered to her. No other explanation appears to have been offered. The defendant simply refused to deliver it.

On behalf of the defendant there was evidence given tending to show that McKinley delivered this trunk ten days after its receipt to the plaintiff's then husband, without requiring the delivery of the receipt, or making any inquiry about it, except that it was delivered to the person who was supposed to be the then husband of the plaintiff. The trial judge charged the jury that if they found as a matter of fact that the trunk and contents belonged to Mr. Wetmore, the person to whom they were delivered, the delivery thereof to him con-

stituted a perfect defense ; that the delivery of property to the real owner always constitutes a defense against the bailor ; that many of the articles contained in the trunk "are conceded to have been wedding presents from friends. If the presents were made to the plaintiff, they became her individual property ; if, on the other hand, they were made to Mr. and Mrs. Wetmore jointly, they became the property of both, and in such case a delivery to either by Tiffany & Co. would be a delivery to both and constitute a perfect defense as to such articles." The jury were directed, therefore, to examine the list of articles which had been testified to by the plaintiff, and determine which of the articles she had purchased herself and which had been given to her individually as wedding presents, and to ascertain the value of those articles, and to allow the plaintiff only for such articles as they should determine under this instruction belonged to her. This, certainly, was as favorable to the defendant as was justified by the facts. Clearly, all of the articles that belonged absolutely to the plaintiff, either because they were purchased by her or because they had been given to her as wedding presents or under other circumstances, were her separate property for which she would be entitled to recover. Whether or not presents given to the husband and wife jointly, which had been left in the possession of the wife, and by her delivered to a bailee for safe-keeping, could be delivered by said bailee to any other person without the consent of the bailor, is a question which it is not necessary for us to determine, as the jury were specifically instructed that they were to allow for those articles only which it was proved belonged to the plaintiff, as either having been purchased by her or presented to her individually. The court expressly charged, at the request of the defendant, that the plaintiff could not recover the value of any articles given as wedding presents to herself and her husband jointly. The plaintiff, being in possession of this property, and entitled to such possession as a joint owner, would be entitled to maintain that possession ; and the property having been delivered to the defendant for safe-keeping, any act of the defendant in delivering the property to another, by which her possession of the property is taken away, would entitle the bailor to maintain an action for a conversion of the property. In such a case possession, coupled with a joint ownership in it, is sufficient to



sustain an action of trover. The rule is stated in the American and English Encyclopædia of Law (Vol. 4, p. 117) as follows: "A person having a special property of goods in his rightful possession can maintain trover against all persons who may wrongfully take the goods from him, even by the command of the general owner;" but, as the jury have found that the property was the individual property of the plaintiff, and as we think that the verdict was sustained by the evidence, it is not necessary to determine that question.

We think, also, that it was not error for the court to charge that the act of the defendant in delivering this property was a conversion by the defendant, and that the plaintiff was entitled to recover the value of the property as of the date of the conversion, May 1, 1889. The answer of the defendant admits the deposit of the goods by the plaintiff with the defendant, to be redelivered to the plaintiff on surrender of the receipt given therefor; and that thereafter, and before the commencement of the action, the plaintiff, at the warehouse of the defendant, duly demanded of the defendant the redelivery to her of the said trunk and its contents, and thereupon produced and offered to surrender the said original receipt, which was then in her possession, and offered to pay to the defendant its premium or charges for the storage and keep of the said trunk and its contents, and that defendant neglected and refused to deliver the said trunk or any of its contents to the said plaintiff; and the plaintiff's testimony fixed the date of that demand, which was not disputed, as the first week in May, 1889.

Assuming that the action was on contract and not for a conversion, the court charged that if the jury found for the plaintiff they might assess the damages, and that the court would add interest thereto from the time of the conversion, as agreed to by counsel. There was no exception to this charge, nor was there any request by the defendant to submit the question of interest to the jury, the only request being that the interest should run only from the time of the commencement of the action in case there was no demand upon the defendant for the property; but the answer admits the demand long before the commencement of the action, and that date was fixed by the plaintiff as of the first week in May. The mere statement by the court to the jury, that there was a conversion of the property as of a certain date, was not error; no recovery was

allowed as based upon a tort rather than on contract. The court correctly instructed the jury as to the measure of damages, assuming that the action was for a breach of contract; and merely characterizing the act of the defendant as a conversion of the property as of a particular date did not change the liability of the defendant or impose upon it any additional burden. Whether the action was upon contract or in tort, the measure of damages was the same; that is, for the value of the property upon the date of the demand and refusal to deliver it to the plaintiff; and as no exception was taken that would raise the question as to the right of the plaintiff to recover interest, except upon the ground that no demand was made, which demand was admitted by the answer, no error appears upon the record that would justify a reversal or reduction of the verdict upon that ground.

Nor do we think that the court erred in refusing to charge that the plaintiff could only recover the lowest estimate of the value of the articles as testified to by the expert witness called for the plaintiff. The difficulty in the way of the plaintiff's proving the value of these articles was great, but that difficulty was caused by the act of the defendant in delivering the articles to a person other than the bailor, and in violation of the express terms of the contract between the plaintiff and defendant, which provided that the goods were to be delivered only upon the production of the receipt. The difficulty of proving the value thus being caused by the wrong act of the defendant, it was not to be relieved from liability because of such difficulty. What the plaintiff was entitled to recover was the fair market value of her property, and that fair value was for the jury to determine from all of the evidence. The claim of the defendant, that several of the articles belonged to the husband and wife jointly, was based upon the use by Mrs. Wetmore of the word "us" in describing the circumstances under which they were given. I think that there is a presumption that the contents of this trunk belonged to the plaintiff. They were in her possession; delivered by her to the defendant. The defendant, the bailee, justifies the delivery of the goods to a third person upon the ground that these articles were owned by such third person. The burden of proof was upon the defendant to show that fact; and at least it was a question for the jury to say whether the

ownership of these articles was proved by the testimony not to have been in the plaintiff. In view of the charge of the court, that the jury were not justified in allowing the plaintiff for the value of the articles that belonged either to the husband personally, or to the husband and wife jointly, the jury must have found that all of the property for which they made an award, which was included in the verdict of \$2,000, was the property of the plaintiff, and that the defendant had failed to sustain that burden by the testimony before them.

It seems to me, however, that the verdict was larger than the record justified. The court charged that the plaintiff could not recover more than the value claimed in the bill of particulars. The value claimed in the bill of particulars was \$2,905. In that was included a gold service valued at \$1,500. Deducting the \$1,500 allowed for it in the bill of particulars, the value of the remaining property, as stated in the bill of particulars, is \$1,405, and adding to that sum the value of the gold service as fixed by the testimony at \$285, made the total amount that the plaintiff was entitled to recover \$1,694 instead of \$2,000, the verdict found by the jury.

We think, therefore, that the judgment should be reversed and a new trial ordered, unless the plaintiff stipulates to reduce the judgment to the sum of \$1,694 and interest thereon from May 7, 1889. Upon the plaintiff's making this stipulation, the judgment as modified thereby is affirmed, without costs of this appeal.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment to \$1,694 and interest thereon from May 7, 1889, in which case judgment as so modified affirmed, without costs of appeal.

THE ALLENTOWN ROLLING MILLS, Appellant, v. THOMAS DWYER,  
Respondent.

*Reference—when a long account is not involved—review of a denial of a motion to refer.*

Where a complaint states four causes of action, one to recover a definite sum alleged to be due upon a contract made by the plaintiff with the defendant, and the others to recover damages resulting from the defendant's alleged breach of the contract, the fact that the items which go to make up the alleged damages occasioned by the breach are numerous does not make the action one upon an account and, therefore, referable; and the defendant, who by his answer presents the general issue as to all the causes of action, is entitled to a trial by jury.

It is only in a very exceptional case that the Appellate Division will review the discretion of the court below in refusing to refer the issues in a common-law action.

APPEAL by the plaintiff, The Allentown Rolling Mills, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of December, 1897, denying its motion to refer the issues in the action.

*John Brooks Leavitt*, for the appellant.

*Charles J. Hardy*, for the respondent.

INGRAHAM, J. :

The plaintiff has appealed from an order denying an application made by it to refer the issues in this action to a referee for trial, and urges in support of its appeal that the court below erroneously applied the decisions of the Court of Appeals as to the character of actions which the courts have the power to refer. This question is one that has been much discussed in this State in view of the provision of the State Constitution of 1777, that "trial by jury in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever" (§ 41), which has been continued in all the revisions of our Constitution since that time. The latest case in which the Court of Appeals has discussed the question is that of *Steck v. C. F. & I. Co.* (142 N. Y. 236). All the former cases were reviewed in the very able dis-

cussion of the question in the opinion of the court and the dissenting opinion of the chief judge, and we think the case clearly settles the rule which is to be applied in applications of this character. The conclusion to which the court arrived is stated by Judge EARL as follows: "If the plaintiff brings his action upon a long account, then it is such as was referable prior to 1777, and as the examination of a long account is required on his side, the defendant cannot defeat a reference by anything he may set up in his answer by virtue of the statutes allowing set-offs and counterclaims. If the plaintiff's cause of action be upon contract for a definite sum of money, or for damages, *ex contractu*, and his cause of action be not gainsaid by the defendant, and the defendant sets up a counterclaim which requires the examination of a long account, then the case is such as would have been referable under the act of 1768. But if in such actions the plaintiff's cause of action be disputed, then a case is presented which, prior to 1777, gave the parties the absolute right to jury trial, and that right cannot be taken away or destroyed by anything which the defendant may set up in his answer." This view was strenuously combatted by the dissenting opinion, but as it received the assent of a majority of the court, it is the rule which, I think, we are obliged to follow.

An examination of the complaint in this case shows that it alleges causes of action which are within the class in which the defendant had a right to a trial by jury. The action is brought to recover upon a contract, whereby the plaintiff agreed to furnish to the defendant all the metal work for the light and fog signal house at Spring Point Ledge, Portland harbor, Me., in accordance with the specifications for the building of such lighthouse, which specifications are made a part of the contract, for a specific sum of money, with a certain time fixed in the contract, and with a provision that should the defendant be subjected to a penalty under the terms of his contract for delay in the erection and completion of the said lighthouse, then the plaintiff would be responsible for so much of said penalty as should be caused by a failure on its part to do the work which it agreed to do within the time specified, and in such event the total of such amount was to be deducted by the defendant from the payment to be made by him to the plaintiff under the terms of the contract.

The complaint alleges four separate causes of action. The first is to recover the balance unpaid of the sum provided for by the contract to be paid to the plaintiff for the performance of the contract. The second cause of action was to recover damages sustained by the plaintiff because of the failure of the defendant to have the ledge upon which the lighthouse was to be constructed properly leveled, as he had agreed to in his contract. The third cause of action was to recover for the damages sustained by the plaintiff because of the delay in the completion of the contract arising by reason of the failure of the defendant to have the ledge upon which the lighthouse was to be built properly leveled, as in the second cause of action. The fourth cause of action was to recover \$112 for demurrage on two scows, paid by the plaintiff at the defendant's request, and \$8 for insurance on certain of the materials used in the contract.

A bill of particulars was furnished by the plaintiff setting forth the items of the fourth cause of action. As to the first cause of action, the amount payable under the contract was stated, with one cash payment credited. Under the second cause of action there was a statement of items of material and labor for replacing the lower part of a caisson which was destroyed, consisting of seven items aggregating \$1,942.89. The third cause of action was for a delay of eighty-four days at \$10 per day, and the fourth cause of action consisted of two items — \$8 insurance, and \$112 for demurrage.

We have thus an action brought to recover, upon several causes of action, a definite sum of money under a contract, and for damages for a breach by the defendant of his contract with the plaintiff; and while the cause of action to recover damages for the breach of the contract consists of several items of damage, the cause of action is entire, and is not upon an account. The cause of action involved here is to recover the damage sustained by a breach of a contract by the defendant, and the fact that the items going to make up the amount of damage that the plaintiff sustained are numerous, does not change the character of the action. There is one contract made by the defendant which it is alleged he has broken. The amount which he is liable for is the amount of damage that the plaintiff sustained in consequence of that breach; and the fact that the items which go to make up such damage are numerous does not make the action one upon an account. As to the other three causes

of action there is nothing in any of them in the nature of an account. The answer of the defendant admits the contract, but denies the breach. It denies the performance of the contract by the plaintiff, and that there is anything due to the plaintiff under it. It admits that the plaintiff expended eight dollars for insurance on the cement, and denies the other allegations constituting the fourth cause of action, and sets up certain counterclaims. The defendant, therefore, substantially denies the allegations of the complaint as to the four causes of action, and raises the general issue as to those causes of action; and upon the issues thus raised the defendant is entitled to a trial by jury.

We think, therefore, that the court was clearly right in holding that the action was not one which, in its nature, was referable. It is proper, however, that we should again state that it is a very exceptional case which would justify us in reviewing the exercise of the discretion of the court below in refusing to refer the issues in an action. The trial by jury in a common-law action is, under our system, the normal method of settling the issues of fact. The court is only justified in ordering a reference in such an action where it clearly appears that, in consequence of the nature of the proof necessary to sustain the plaintiff's cause of action, a trial by jury is not practicable; or when the plaintiff's cause of action is based upon an account involving many distinct items, each of which has to be proved; and where it is impracticable for a jury to scrutinize the evidence offered to establish each particular item of the account. Where an action is brought to recover for goods sold and delivered, which include many separate sales at different times, each one of them must be proved, and the value of the goods sold ascertained, it is quite apparent that a trial by jury would be impracticable, as it would be impossible for the jury to carry in their minds the evidence as to the sale and delivery of each particular lot of goods sold and the value thereof. Many other instances could be adduced of a cause of action which involves the examination of an account, with the proof of many items, when each item must be proved as a separate fact; but where one of the parties to an action insists upon the right to have his case tried in the ordinary way by a jury, the trial court should not refuse such a trial and insist upon sending the case to a referee, unless it clearly appears that, because of the nature

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of the proof required to sustain the plaintiff's cause of action, such a trial is impracticable. If, upon the submission of that question to the trial court, that court determines that a trial by jury is not impracticable, we would not be justified in reversing its decision, except in a plain case where we can see that a trial before a jury would require the submission to the jury of questions which it would be impracticable for them to determine. Irrespective of the power of the court to grant the application made, there is not presented in this case such a condition as would justify us in saying that it appears that any difficulty will be presented in trying the questions before a jury.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements

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HENRY J. S. HALL and Others, as Executors, etc., of WILLIAM H. HALL, Deceased, Respondents, v. RAFALA S. BESTON, Trading under the Name of R. S. BESTON & Co., Appellant.

*A written sealed lease — a prior parol promise by the landlord to make repairs is merged in it — a promise during the term to repair if the tenant would remain is without consideration.*

An oral agreement, made prior to the execution of a written lease, under seal, for five years, containing no covenant binding the landlord to repair, and apparently on its face embracing the entire understanding of the parties to it, by the terms of which oral agreement the landlord undertakes to make certain repairs during the term, must be deemed to have been merged in the lease, and cannot, in an action brought to recover rent due under the lease, in which the tenant sets up the breach of this oral agreement as a counterclaim or defense, be proved by the tenant as an independent collateral promise.

A promise by the landlord, made during the term and when the tenant threatened to remove from the premises, that if he would remain the landlord would make the repairs in question, is not enforceable, there being no consideration to support it.



APPEAL by the defendant, Rafala S. Beston, trading under the name of R. S. Beston & Co., from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 4th day of February, 1897, as of the 27th day of April, 1896, upon the decision of the court rendered after a trial at the New York Trial Term before the court without a jury.

*Isaac N. Miller*, for the appellant.

*John M. Bowers*, for the respondents.

INGRAHAM, J. :

The action was brought to recover the rent due by the defendant under a lease between the plaintiffs' testator and the defendant. The complaint alleged the making of the lease; that the defendant had not paid the rent for the months of May, June, July, August, September, October, November and December, 1895, aggregating \$1,600, except the sum of \$450, paid on account, leaving a balance of \$1,150 due and unpaid. The answer admits the making of the lease; denies that the rent is unpaid, and alleges as a separate answer and defense, and by way of counterclaim, an agreement between the plaintiffs' testator and the defendant, in consideration of which the lease in the complaint was signed, whereby the plaintiffs' testator agreed to make certain repairs in the cellar and upon the roof, and to abate a nuisance occasioned by defective drainage of said cellar; that the plaintiffs' testator failed to carry out that agreement, and that thereupon the plaintiffs' testator broke the covenant in the lease contained that the lessee should have, hold and enjoy the said demised premises. The damage to the defendant in consequence of the failure to keep such agreement is alleged to be the sum of \$5,000, and judgment is demanded against the plaintiffs for that amount. The plaintiffs' reply denied every allegation in the answer constituting a counterclaim. The case came on to be tried at a Trial Term of the court, a jury being waived and the case was thus tried before the court without a jury. The court found the making of the lease, the default in the payment of the rents and that the amount due was \$1,150, and judgment was thereupon entered in favor of the plaintiffs for that amount, with costs.

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The trial seems to have been somewhat informal. The making of the lease was admitted by the answer, and it was also proved by the subscribing witness. It is true he testified that he did not remember who signed the defendant's name to it, but he proved his own signature. The objection to the lease was that it was not identified — not that it was not sufficiently proved. The objection was clearly bad; and as no other objection was taken no other can be considered on appeal.

The husband of the defendant was called as a witness. He testified that he was the agent and attorney for the defendant, and was then asked as to the condition of the premises at the time of the lease. That was objected to. Counsel for the defendant then made an offer of proof, and in the absence of any other statement in the record it must be considered that this offer contained a statement of the facts which it was claimed would prove the defense set up in the answer. That offer was to prove that before the execution of the lease the lessor undertook and agreed to make the cellar water tight so that it would be available for the purposes for which the defendant desired it; that he attempted to do so and did not succeed; that the defendant notified the lessor that he considered the covenant and agreement broken and that she should move; that plaintiff then made a new contract with her, and agreed that if she would remain he would put the cellar in repair so that it should be available to her for the purposes for which she wanted it; that on these conditions she did so remain; that Mr. Hall again attempted to fix it repeatedly, but that the water continued to come into the cellar and filled it to such an extent that it was unavailable for the purposes for which the defendant wished it, and that by reason of this failure the defendant was greatly damaged and injured as stated in the answer. These were the only facts that the defendant offered to prove. Counsel for the defendant subsequently made the claim "that there was a defect in the construction of the building, and that these repairs were substantial and lasting and of a general nature, and that there was a covenant for quiet enjoyment which was broken, we not being able to use this at all." The court then asked the counsel for the defendant whether the statements which he alleged were made by the landlord were oral or in writing. Counsel replied that the statements were oral. The court then

asked whether the understanding had, after the lease was made, was founded on any new and independent consideration, or any consideration other than the promise of the tenant to remain. To that the counsel for the defendant said: "The promise of the tenant to remain; he was about to remove." The Court: "That was the sole consideration?" Counsel for the defendant: "Was the consideration." The court then said: "I will consider your offer. If I decide against you, the case is finished. If I decide in your favor, you will go on with your testimony to-morrow morning." To that statement of the court no objection was made, and counsel must be held to have acquiesced in this method of terminating the trial. The question for the court then, was whether the facts stated in the offer would prove either the defense or the counterclaim set up in the answer. The following statement then appears in the case: "The amount due on the lease is one thousand one hundred and fifty dollars, and the interest is forty-four dollars and forty-eight cents, making one thousand one hundred and ninety-four dollars and forty-eight cents." To that no objection was made by either of the counsel, and it must be held to be a conceded fact. Subsequently, and on the next morning, the court sustained the objection to the testimony offered, and to that decision of the court the defendant excepted. The sole question upon this appeal is whether the facts alleged in the offer would constitute the defense to the action or the counterclaim set up in the answer.

The lease is under seal, dated — day of April, 1893. By it the landlord leased to the defendant the store No. 243 Greenwich street, in the city of New York, for the term of five years from the 1st day of May, 1893, at the yearly rent or sum of \$2,000 for the first year and \$2,400 per year for the remaining years, and the defendant covenanted to pay that rent and the charge for Croton water. There was no covenant in the lease that either party would make any repairs, but the defendant covenanted that she would quit and surrender the premises at the expiration of the term demised in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted, and there was a covenant on behalf of the landlord of quiet enjoyment.

The court delivered an opinion upon sustaining the objection to the evidence offered, holding that the defects in the cellar, if such

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there were, existed before the hiring, and that the tenant was aware of them, and, presumably, took the premises for better or worse; that the second promise was without consideration and unenforcible; that the prior negotiations were merged in the written instrument; that the rights and duties of the parties were to be determined by that instrument, and that this promise to repair, not contained in the lease, was not an independent collateral promise.

We think that the court was clearly right in the determination of this question for the reasons stated upon sustaining the objection to the evidence. It was not alleged in the answer, nor did the defendant offer to prove, that she did not actually occupy the premises during the term for which the rent was unpaid, nor that she ever surrendered or offered to surrender the leased premises. The answer alleges that she was unable to occupy the cellar, which was a comparatively unimportant part of the demised premises.

We think, therefore, upon the whole case, that the judgment appealed from should be affirmed for the reasons stated in the opinion of the trial judge,\* with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

\*MCADAM, J.:

The executors of William H. Hall sue to recover rent due upon a sealed lease of premises, 248 Greenwich street, demised for five years, from May 1, 1898, at a specified rental. The defense is that the lease was signed in consideration of a promise by the testator to make certain permanent repairs to the cellar, and that during the term the promise was renewed. Both promises were oral. The only consideration alleged is the execution of the lease and the defendant's promise not to remove. The defects of the cellar, if such they were, existed before the hiring; the tenant was aware of them, and presumably took the premises for better or for worse. (*Bloomer v. Merrill*, 1 Daly, 485.) The second promise is clearly without consideration and unenforcible. (*Gottberger v. Radway*, 2 Hilt. 342; *Speckels v. Sax*, 1 E. D. Smith, 253.) In legal contemplation the mutual provisions of the lease formed its only consideration. This brings us to the vital question whether what is alleged to have been said as to repairs prior to the execution of the lease was merged in it, or amounts to an independent collateral agreement, which, though oral, is provable without impairing the rule that written instruments, which apparently contain the entire agreement of the parties, are not to be varied or enlarged either in their terms or legal effect by oral evidence. The settled rule is that where, upon the inspection of a contract, it appears to contain

HENRY P. KIRKHAM, Appellant, v. THE BANK OF AMERICA,  
Respondent.

*Payment of a draft — liability of a bank in collecting a draft for a customer — effect of the acceptance, by its agent, of the drawee's draft upon a third person.*

Where the agent of a bank in which a draft has been deposited for collection surrenders the draft to the drawee and accepts a draft for its amount, drawn by the drawee upon a third person, the first-mentioned draft is thereby paid, the presumption being that the drawee's draft was accepted in payment of the draft received for collection; in any event, the collecting bank is bound either to return to its customer the draft received for collection, properly protested, so as to charge the drawer, or to pay him the money.

PATTERSON, J., dissented.

A bank which receives from a customer a draft for collection is liable for a loss occasioned by the acts of its correspondents or other agents selected by it to effect the collection.

The effect of a collecting bank in such a case having notified its customer that a draft left with it for collection was paid, and having credited the customer in its account with him with the amount thereof, and for a long time thereafter having acted upon the theory that the customer was entitled to regard the draft as paid, considered.

APPEAL by the plaintiff, Henry P. Kirkham, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 21st day of June, 1897, upon the decision of the court rendered after a trial at the New York Special Term.

the entire engagement of the parties, and to define the object and measure the extent of such engagement, it constitutes and is presumed to contain the whole contract. (*Eighmie v. Taylor*, 98 N. Y. 288; *Engelhorn v. Reitlinger*, 122 id. 76.) The court, in the case last cited, said: "All prior and contemporaneous negotiations and oral promises in reference to the same subject are merged in the written contract, and the rights and duties of the parties are to be determined by that instrument." The principle has been frequently applied to leases and other writings. (*Wilson v. Deen*, 74 N. Y. 533; cited and approved in *House v. Walch*, 144 id. 418; *Marsh v. McNair*, 99 id. 174; *Thomas v. Scutt*, 127 id. 133.) To hold that a promise to repair, not contained in a lease, is an independent collateral agreement, would not only deprive the plaintiffs of all protection of the rule stated, but impair its object and put landlords almost at the mercy of tenants. The lessor, careful to reduce his agreement to writing, has since departed this life, and there are no means of contradicting any evidence of oral promises which the defendant may offer. If there is any efficacy in the old rule it ought to be

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*Ernest Luce*, for the appellant.*Charles E. Rushmore*, for the respondent.

INGRAHAM, J.:

The complaint in this action alleges that during and previous to the month of November, 1890, plaintiff was a depositor of the defendant; that on or about the 25th day of October, 1890, one George K. Kirkham, the plaintiff's partner in business, received from one Blanchard a sight draft for the sum of \$3,120, drawn by said Blanchard, as president of a corporation known as the Interstate Investment Company, upon the Bank of South Hutchinson, of South Hutchinson, Kans., a financial institution doing a general banking business; that the said draft was indorsed payable to this plaintiff, or to his order, and delivered to him by said George K. Kirkham, and deposited by plaintiff with the defendant for collection, and the amount of said draft was thereupon entered by the defendant in the plaintiff's pass book as a draft deposited for collection; that thereupon the defendant forwarded the said draft to its agent and correspondent, the Boatmen's Bank of St. Louis, an incorporated financial institution doing a general banking business at St. Louis, Mo., which in turn forwarded the draft to its agent and correspondent, the First National Bank of Hutchinson, Kans.; that the said draft was presented by the said First National Bank of Hutchinson to the Bank of South Hutchinson, whereon it was drawn, and was accepted by it; that thereupon the said First National Bank of

enforced to protect the estate from dangers resulting from unreliability of memory of conversations long since passed. To bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part the writing must appear on inspection to be an incomplete contract. (*Case v. Phoenix B. Co.*, 134 N. Y. 78; *Thomas v. Scutt*, *supra*.) The reverse of that appears here. The obligation of a landlord to repair rests solely upon express covenant. (*Witty v. Matthews*, 52 N. Y. 512.) The lease, which is one the statute requires to be in writing, appears to have been carefully drawn, and was executed with every formality. It contains mutual covenants, and there is no apparent reason why every other promise should have been put in and this one left out. In *The Mayor v. Price* (5 Sandf. 342) the tenant undertook in like manner to prove that the landlord, contemporaneously with the execution of the lease, agreed to make certain repairs, and the court (at p. 550) said: "The lease is an instrument apparently perfect in itself, and purports to contain the agreement of each party. There are no ambiguities in the terms of the lease, requiring explanations to make it

Hutchinson surrendered the said draft to the said Bank of South Hutchinson and consented to receive, and did receive, payment of the said draft, not in cash, but by a certain demand check, drawn by the said Bank of South Hutchinson to the order of the Boatmen's Bank upon the Merchants' Exchange National Bank of the city of New York for the amount of said draft, less the then current rate of exchange on New York; that on or about the 3d day of November, 1890, the defendant notified the plaintiff that the said draft had been paid, and thereupon the defendant entered the amount of the said draft in the pass book of the plaintiff as a cash deposit item and as an amount on deposit with it to the credit of the plaintiff; that the check, drawn by the Bank of South Hutchinson on the Merchants' Exchange National Bank of the city of

intelligible. In such a case it cannot be shown that there was a promise of either party different from or in addition to those contained in the executed contract." To the same effect are *Mayer v. Moller* (1 Hilt. 491); *Howard v. Thomas* (12 Ohio St. 201). In *Post v. Vetter* (2 E. D. Smith, 248) the same principle is reiterated, with the qualification that such a promise made during the term, founded on a new consideration, may be proved. The cases relied upon by the defendant are distinguishable either by the fact that they refer to agreements not required to be in writing or to a different state of facts. In *Chapin v. Dobson* (78 N. Y. 74) the plaintiff was allowed to prove a warranty on a sale as collateral to the principal contract. In *Clenighan v. McFarland* (11 N. Y. Supp. 719) the oral agreement was to put the premises in repair before the commencement of the term, and as a condition precedent to the operation of the lease. So, in *Mann v. Nunn* (43 L. J. C. L. [N. S.] 241), the agreement was to put an unfinished house in a state fit for habitation before the commencement of the term. In the *Clenighan* case the court recognizes the distinction by holding that, if the agreement had been to make repairs during the term, proof of the oral agreement would have been inadmissible, and so in the other cases the promise held to be collateral was to do acts antecedent to the operation of the demise. When the statute requires the terms of a contract to be in writing, neither party will be permitted to show that it was other or different from what is expressed. (*Routledge v. Worthington Co.*, 119 N. Y. 592.) It is a task to reconcile the cases and get at their distinguishing features, for the question of what constitutes a collateral undertaking is necessarily close, and requires the greatest care in enforcing one rule that another equally important to the administration of justice may not be impaired. If the answer had alleged that the repairs were to be made antecedent to the term, and that their performance had been postponed at the request of the landlord until after it had commenced, there might have been force in the defendant's contention that the promise was collateral to the lease. For these reasons the oral evidence was properly excluded, and the plaintiffs are entitled to judgment for \$1,194.48.

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New York, was forwarded to the defendant, and when received it was presented for payment to the said Merchants' Exchange National Bank, and payment was refused on the ground that there were not sufficient funds on deposit to the credit of the Bank of South Hutchinson, and that subsequently the defendant canceled the credit given to the plaintiff for the said draft and refused to pay the amount thereof.

For a second cause of action the plaintiff realleged the facts before stated, and alleged that the defendant had failed to return the check drawn by the Bank of South Hutchinson upon the Merchants' Exchange National Bank of New York, and to demand the draft deposited by the plaintiff with the defendant, and had failed and refused to have the said draft protested, or to deliver to the plaintiff the said draft so deposited with the defendant by the plaintiff.

The facts alleged in the complaint before referred to were either admitted by the answer or proved upon the trial. The plaintiff testified that one Blanchard was indebted under a guaranty to Mr. George K. Kirkham, and that he drew a draft as president of the Interstate Investment Company upon this South Hutchinson bank, and gave it in payment of that indebtedness to the plaintiff, who was then acting as agent and attorney in fact for George K. Kirkham, payee in the draft; that the plaintiff, acting under that power of attorney, indorsed the draft and took it personally to the Bank of America, and deposited it in the Bank of America; that it received it, and plaintiff asked the cashier if he would place it to his credit; that the cashier said no, he could not do that, but that he would notify the plaintiff when the draft was collected, and then would place it to the plaintiff's credit. On November third a postal card came to the plaintiff from the bank signed by the cashier, in which he told the plaintiff to bring his pass book to the bank to have the amount of this draft placed to his credit. Upon taking the pass book to the Bank of America it placed this amount to his credit. On the eighth or ninth of November, subsequently, the defendant informed the plaintiff that the check upon the Merchants' Exchange National Bank of New York, which had been sent to them as the check given in payment of the draft, was unpaid, as the New York bank upon which it was drawn had refused to pay it, and nothing was then said about



canceling the credit, the plaintiff merely promising that he would see the drawee of the draft deposited with the defendant, and assist the defendant in any way that he could. Subsequently several letters passed between the plaintiff and the defendant, the first of which was dated November 11, 1890, from the defendant to the plaintiff, in which the defendant requested the plaintiff to call upon the defendant with reference to the collection of this draft. Subsequently plaintiff wrote defendant that Blanchard had informed him that a remittance would be made to pay the drafts on New York received by the defendant or its agents. A letter of November eighteenth from the defendant to the plaintiff stated that no remittance had been received. by the New York bank to pay the draft of the Bank of South Hutchinson, Kans., and continued: "We are anxious to have a satisfactory adjustment of this matter made at an early date and beg to request your further efforts in whatever direction necessary to protect our friends in St. Louis." It is quite apparent that up to this time no claim was made that the plaintiff was responsible in any way for the failure of the Missouri bank to collect the draft or that the defendant had any right to cancel the credit that it had given to him as upon payment of the draft deposited for collection. The first notice that any such claim was made was contained in a letter of November 25, 1890, from the defendant to the plaintiff, whereby the plaintiff was informed that "we shall hold against your account the sum of \$3,120, the amount of a certain check made by Ben Blanchard and drawn on the Bank of South Hutchinson, Kansas." On the same day the plaintiff replied to that letter that defendant had no right to do this and protested against its doing it, stating that he would hold the bank responsible. On the same day the plaintiff wrote to the defendant protesting against their refusing to pay a check of \$2,500 upon his account with the defendant's bank, and stating that he intended to hold the bank responsible for the loss sustained. In answer to that the defendant requested that any further communication that the plaintiff had to make be made to its counsel. Subsequently, on November twenty-sixth, the plaintiff made a demand for the amount of the balance in the defendant's bank, including the credit given upon this draft, which demand was refused. There was also introduced in evidence a letter written by

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Blanchard to the defendant dated November 20, 1890, which contained a request to the defendant to have the Boatmen's Bank wait eight or ten days before proceeding against the Bank of South Hutchinson upon the draft given to it, and a promise by Blanchard that he would raise the money and pay the draft. It further appeared that upon the books of the defendant bank there was a credit to the plaintiff of this Kansas draft of \$3,120, and subsequently a debit "Credited in error, Nov. 3d, '90, \$3,120."

For the defendant it was proved that it was the custom of banks in the United States, when a draft is sent to a bank outside of the city of New York from a New York city bank for collection, for the drawee bank to pay that draft upon itself by what is called a return exchange upon New York; that is, the drawee bank gives in payment of the draft drawn upon it a draft upon its New York correspondent for the amount of the draft; that in some instances such draft or check is a draft or check of the drawee bank, in other instances, of some other institution, and that the New York exchange is generally drawn to the order of the collecting agent. There was no proof but that the Bank of South Hutchinson was solvent or that it would not have responded to a demand on it for the amount of its draft on New York which was unpaid.

It will thus be seen that the main facts are conceded. The plaintiff deposited a draft with the defendant for collection. The defendant accepted the draft for collection, and thereby assumed the responsibility of a collecting agent to the plaintiff. It sent this draft to its agent in Missouri, which adjoins the State of Kansas, where the drawee was located, for collection. The draft was presented to the drawee for that purpose; was delivered to the drawee and the defendant's agent accepted as payment a sight draft of the drawee upon its correspondent in New York; and, subsequently, upon receipt of information from its agent that the draft had been paid, the defendant credited the plaintiff with the proceeds of the draft and notified the plaintiff of such credit. The question is whether this defendant is authorized to repudiate such credit, and to refuse to recognize this draft so deposited for collection as paid, without returning the draft so deposited properly protested, so as to charge the drawer. It must be conceded here that, upon the credit given by the defendant to the

plaintiff, the defendant became indebted to the plaintiff to the amount of that deposit. It undertook to collect for the plaintiff this draft upon the Kansas bank. It forwarded it to its agent for that purpose; delivered such draft to the drawee and accepted in payment of the draft the drawee's draft upon New York, and adopted this as a payment of the draft deposited with it for collection. This certainly, as between the defendant and the drawee of the draft deposited by the plaintiff, was a payment of the draft.

The legal obligation assumed by a bank receiving from a customer a draft drawn by a third party for collection has been much discussed, and, where there is no express agreement, has resulted in considerable difference of opinion. It seems, however, to be now well settled in this State by repeated adjudications of the Court of Appeals. It was the duty of the defendant to present the draft to the bank upon which it is drawn for payment (*Indig v. National City Bank*, 80 N. Y. 103), and it is liable for a loss occasioned by the acts of its correspondents or other agents selected by it to effect the collection. "In such a case the collecting bank assumes the obligation to collect and pay over, or remit the money due upon the paper, and the agents it employs to effect the collection, whether they be in its own banking house or at some distant place, are its agents, and in no sense the agents of the owner of the paper. Because they are its agents, it is responsible for their misconduct, neglect or other default." (*St. Nicholas Bank v. S. N. Bank*, 128 N. Y. 30.) This defendant then assumed this obligation and sent this draft to its agent, the Boatmen's Bank at St. Louis; and the Boatmen's Bank forwarded the draft to its agent at Hutchinson. That agent at Hutchinson presented the draft to the drawee, in performance of its duty, and demanded payment. At that time the drawee of the draft was under no legal obligation to either the plaintiff or the defendant or the defendant's agent to pay the draft. If it had refused to pay, no cause of action would have existed in favor of either against the Bank of South Hutchinson. That bank, the drawee of the draft, however, assumed to the defendant or its agents the obligation to pay that draft, and in pursuance of such obligation it gave its sight draft on New York payable to the order of the Boatmen's Bank of St. Louis, and that was accepted by the agent, the Boatmen's Bank, in lieu of or as a means of payment of the draft.

It will be noticed here that the inception of any liability of this Bank of South Hutchinson, either to the plaintiff or to the defendant or its agents was, by the delivery of this draft upon New York, as a payment of the draft upon it. It agreed to honor the draft, and gave to the defendant's agent its draft on New York, and having given that draft on New York, it became liable to pay that draft in case its correspondent in New York failed or refused to pay it; and the defendant or its agent, by the acceptance of this draft on New York, thus obtained an obligation which, but for such acceptance it would not have had, namely, the liability of the Bank of South Hutchinson to pay the amount of the draft. In consideration of such obligation the defendant's agent delivered to the Bank of South Hutchinson the draft drawn on it, which the Bank of South Hutchinson accepted and retained. By that transaction the draft drawn on the Bank of South Hutchinson, and which had been received by the defendant for collection, was paid. No right of action then existed as against the drawer of that draft; certainly not until the defendant or its agent had in some way repudiated the payment or returned the obligation which it had received from the Bank of South Hutchinson, and demanded back the draft which it had presented for payment and in the payment of which it had accepted the obligations of the Bank of South Hutchinson.

The question as to the effect of a receipt by a creditor of a check or draft of a debtor in payment of a debt has been much discussed, but it seems to be now settled that the receipt of such a check or draft is not a payment of the debt unless there is an express agreement to that effect, the burden being upon the debtor to prove that agreement. But in such a case, where the check or draft is given upon the incurring of the obligation, it is at least *prima facie* a conditional payment. (Story Prom. Notes, § 104; 2 Pars. Notes & Bills, 157; Dan. Neg. Inst. § 1261.) It seems also to be settled that where, at the time of the incurring of an obligation, the debtor delivers to the creditor a note or bill of a third person for the indebtedness, the presumption is that the creditor takes it in payment. (*Noel v. Murray*, 13 N. Y. 171.) In this case, therefore, the defendant's agent having accepted this draft upon New York, upon presentation of the draft upon the South Hutchinson bank, the presumption is that it was received as payment of the draft, and as

there was no evidence to show a contrary intent or another agreement between the parties to that transaction, the draft drawn upon the South Hutchinson bank must be presumed to have been paid. This presumption is absolute in the absence of any repudiation of such agreement by the defendant or its agent by a notice to the South Hutchinson bank of such repudiation, and of a tender to the South Hutchinson bank of its draft on New York with a demand from it for the draft which had been delivered to it, and for the payment of which the draft on New York had been accepted. The draft thus deposited with the defendant for collection having been paid, the obligation of the defendant to the plaintiff is clear. The defendant was bound to pay to the plaintiff the amount of that draft. The plaintiff in this case had nothing to do with the method adopted by the defendant or its agent to secure such a payment, or as to the manner in which the defendant received such payment. The defendant could accept what it pleased in payment of the draft, but upon the draft being paid, it was bound to pay to the plaintiff the amount of the draft, not the specific bills or money, or other obligation which the defendant had accepted for such a payment.

It seems to us, therefore, that the defendant was liable to the plaintiff for the amount of that draft which it had collected from the Bank of South Hutchinson, irrespective of what its agents had accepted as such payment from the Bank of South Hutchinson. This view is entirely consistent with the decision of the Court of Appeals in the case of *Indig v. National City Bank* (80 N. Y. 103). There the defendant, having received for collection a note payable at the Bank of Lowville, in pursuance of its duty to present it to that bank for payment, sent it by mail directly to the bank where it was payable. It appeared that that was the ordinary method of transacting such business, and that the defendant was justified in adopting the ordinary mode, and it was held that, by thus transmitting the note to the bank where it was payable, the defendant did not constitute the Lowville bank its agent and thus was not responsible for its failure to pay. The opinion of Judge RAPALLO in that case does not appear to have been concurred in by a majority of the court. Judges FOLGER and ANDREWS did concur in that opinion. CHURCH, Ch. J., concurred on the question of damages, and MILLER,

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EARL and DANFORTH, JJ., dissented. A somewhat similar question was presented to the court in the case of *Briggs v. Cent. National Bank* (89 N. Y. 184), where Judge RAPALLO, who had written the opinion in the *Indig* case, writes the opinion of the court. This opinion was concurred in by all the judges. In speaking of the *Indig* case the court said: "The point of the decision is that the mere act of presenting the paper for payment by mail, instead of employing a messenger to present it, does not constitute the drawee agent of the sender to receive or hold the proceeds." It was held that that case did not apply to the case then before the court, for the reason that it appeared that the drawee was the agent of the defendant, the collecting bank, and that where the drawee was such agent, and where the collecting bank sent the note to such agent and the amount thereof was credited to the defendant in its collection account, the drawee of the check had the right to discharge the drawer and substitute itself as a debtor to the defendant for the amount; that it did so, and that the defendant must be regarded as having accepted the responsibility of the drawee upon its credit in the collection account in payment of the check. This decision seems to apply to the case at bar. Here the defendant or its agent did accept the responsibility of the Bank of South Hutchinson; did discharge the drawer of the draft deposited with the defendant for collection, and did substitute the Bank of South Hutchinson as its debtor for the amount of that draft. In the case of *St. Nicholas Bank v. S. N. Bank* (128 N. Y. 32), in speaking of the *Indig* case, it was said that the defendant there would have been held liable if the Lowville bank had been its agent for the collection of the note.

The view before expressed, that the delivery of this draft to the Bank of South Hutchinson and the receipt by the defendant's agent of this draft upon New York was a payment of that draft, is amply sustained by the authorities. In the case of *People ex rel. P. C. Savings Bank v. Cromwell* (102 N. Y. 482) the court says: "If upon presentation of a check or order such agent or bank should refuse payment, the debt remains unpaid, but if the creditor accepts anything other than legal currency in payment, the debt is discharged. The authority of the depository is simple, and limited to the act of making payment, and if the creditor goes further and deals with it for any other transaction than that of receiving payment, he does

so upon his own responsibility, and must bear the consequent loss, if any, of such a transaction." And it was there held that upon presentation of coupons calling for the payment of a sum of money by the creditor to the bank of deposit which paid such coupons for the obligor, the acceptance by the creditor of a check of the banking house upon New York for the amount of the coupons was a payment of the coupons and discharged the obligor.

The case of *First Nat. Bank v. Fourth Nat. Bank* (77 N. Y. 323) was an action brought to recover damages alleged to have been occasioned by the negligence of the defendant in the performance of its duty as agent in collecting a draft sent to it for that purpose. The draft was received by the defendant on the morning of March twenty-sixth, and was on the same morning presented to the drawee for payment. Upon such presentation it received from the drawee its check for the amount on the Third National Bank of New York, and the draft was delivered to it. The defendant did not present the check to the bank for payment on that day, but it was sent through the clearing house and presented for payment on the next day, the twenty-seventh. The drawee failed on that day, and the bank refused to pay the check. The defendant then took the check, and on the same day returned it to the drawee, and received back the draft for which it had been given, and then formally demanded payment of the draft, and caused the same to be protested for non-payment; and on the next day, March twenty-eighth, due notice of such non-payment was served by mail upon the plaintiff. It was held that, upon these facts, sufficient was done to charge the drawer of the draft, but that the mere fact of preserving the liability of the drawer upon the draft was not the performance of the whole duty of the collecting agent to its principal; that a collecting agent must so act as to charge all the parties to the paper and will become liable for a loss occasioned by its negligence.

In the case of *Smith v. Miller* (43 N. Y. 171), which was again before the Court of Appeals (52 id. 545), it was expressly held that to preserve recourse to the drawers of the draft the plaintiff should, when the check given in payment thereof was dishonored, have demanded back the draft and again presented it for payment, and in case of refusal, given notice of such demand and refusal to the drawers, and that the fact that the drawees were insolvent was no

excuse for such neglect to protest the draft and give notice thereof to the drawer; and it was held that the *laches* of the plaintiff in not again demanding payment of the draft when the check was returned, was sufficient to discharge the liability of the defendant as drawer of the draft, and to extinguish the debt for which the draft was given. (See, also, the case of *Anderson v. Gill*, 25 L. R. A. 200, and note, where the cases are reviewed.)

The Supreme Court of Pennsylvania states the rule to be as follows: "It is safe to say, as a general rule, that when a bank receives a check from one of its depositors for collection, it must return him the check or the money. It is also equally clear that if the collecting bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check, or other obligation in lieu thereof, its liability to its depositor is fixed—as much so as if it had received the cash. It has no right, unless specially authorized to do so, to accept anything in lieu of money." (*Fifth Nat. Bank of Pittsburgh v. Ashworth*, 2 L. R. A. 493.) The authority cited in the opinion and in a note to the case would seem to sustain the proposition thus broadly stated.

It is sufficient for the decision of this case to sustain the first proposition, that the defendant was bound to return to the plaintiff either the draft which it had received for collection or the money. It credited him with the money, and it thus became indebted to him for that amount. To justify them in canceling that credit or refusing to pay on demand, they were at least bound to deliver to him the draft properly protested, so as to charge the drawer; and, in the absence of such a return of the draft, they were liable for the money. It was proved without contradiction that the plaintiff demanded the return of the draft deposited with the defendant for collection, and that the defendant failed to comply with that demand. The acts of the defendant, after it had knowledge of the fact that the draft upon New York which it had received from the South Hutchinson bank had not been paid, clearly recognized its obligation to the plaintiff. It again and again requested the plaintiff to endeavor to induce the Bank of South Hutchinson to provide funds to pay the draft upon New York, and the plaintiff did make such endeavor. During all this time the proceeds of the draft deposited with the defendant for



collection were standing to the credit of the plaintiff, and no attempt was made by the defendant, during such negotiations, to cancel such credit; and as late as November the defendant wrote the plaintiff a letter in which it said: "We are anxious to have a satisfactory adjustment of this matter made at an early date, and beg to request your further efforts in whatever direction necessary to protect our friends in St. Louis." Subsequently, on November twentieth, the drawer of the draft upon the South Hutchinson bank wrote to the defendant requesting them to hold on to the draft from the Bank of South Hutchinson, Kans., stating that if it allowed the Boatmen's Bank to close out the Bank of South Hutchinson, the defendant would not get the money from it under some months, and that the drawer of the draft would not get his money, over \$12,000, from them either; "while if you will request the Boatmen's Bank to simply wait eight or ten days, I will raise the money and pay it, and the bank will come out all right and soon pay me." And it was not until November twenty-fifth that the defendant gave the formal notice to the plaintiff that the credit given to him upon the draft deposited with the defendant for collection would be canceled. The plaintiff at once protested against such a course, stating that the defendant had no right to do this, in answer to which the defendant wrote to the plaintiff regretting that the plaintiff had placed the defendant in a position that had caused so much unpleasantness, and requesting the plaintiff to make any further communication that he had to make with its counsel. During all this time there is no evidence that the defendant took any steps to rescind the payment of the draft deposited with it for collection, or to procure it from the Bank of South Hutchinson and deliver it to the plaintiff, or made any claim that it was not responsible to the plaintiff. It neither offered to return it in its answer, nor did it tender it to the plaintiff upon the trial. Nothing that the plaintiff did induced the defendant to refrain from repossessing itself of the draft which it had surrendered to the Bank of South Hutchinson. On the contrary, what the plaintiff did was at the request of the bank to relieve it from the liability which it admitted it had incurred by accepting this draft on New York in payment instead of money. The burden was upon the defendant of showing that it had repudiated this payment of the draft deposited with it for collection, as the acceptance of the draft created

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at least a presumption of payment, and the plaintiff was entitled to stand upon such presumption.

We think, therefore, that upon the facts as proved the defendant was liable to the plaintiff for the amount of this draft deposited with it for collection.

Some criticism is made upon the plaintiff's complaint, on the ground that it is not sufficient to sustain a cause of action to recover the proceeds of this draft as paid. The complaint, however, alleges all the facts necessary to sustain the judgment, and expressly alleges that the defendant's agents did receive the draft of the Bank of South Hutchinson upon New York in payment of the draft deposited with it for collection; and while there are many immaterial facts alleged in the complaint, and the draftsman appears to have had a rather misty idea as to the ground upon which he based his cause of action, the facts necessary to make the defendant liable upon the ground before indicated are alleged, and these facts were either admitted by the answer or proved without contradiction upon the trial.

The judgment is reversed and a new trial ordered, with costs to the appellant to abide the event.

BARRETT and McLAUGHLIN, JJ., concurred; VAN BRUNT, P. J., concurred in result; PATTERSON, J., dissented.

Judgment reversed, new trial ordered, costs to appellant to abide the event.

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SIGMUND M. MUNDT, as Administrator de bonis non of MARTIN M. MUNDT, Deceased, Appellant, v. GERTRUDE GLOKNER, Respondent.

*Leave to appeal to the Court of Appeals — next of kin, for whom an executor may sue — effect of the death of the next of kin before the trial.*

In an action given by section 1902 of the Code of Civil Procedure to an executor or administrator, in his representative capacity, to recover damages for a wrongful act, neglect or default occasioning the death of his decedent, it was considered by INGRAHAM, J., that the question who was the next of kin should be determined as of the time of the death.

Effect on the amount of damages, of the death before the trial of the action of one originally entitled to the recovery, considered by INGRAHAM, J.

Leave to appeal to the Court of Appeals given in such a case.

MOTION by the appellant, Sigmund M. Mundt, as administrator *de bonis non* of Martin M. Mundt, deceased, for leave to go to the Court of Appeals.

*Alfred Steckler*, for the appellant.

*Marshall B. Clarke*, for the respondent.

INGRAHAM, J. :

As the question presented upon this appeal was novel and of first impression, we think that leave should be granted to appeal to the Court of Appeals.

The question presented, however, was simply as to whether any cause of action survived the death of the person who was the next of kin of the deceased. Necessarily the question as to what damages such next of kin sustained in consequence of the death of the deceased was not before us. We called attention to the fact that by section 1902 of the Code the right to maintain an action to recover damages for a wrongful act, neglect or default occasioning the death of a person under the circumstances mentioned in that section, is given to the executor or administrator of the deceased person in a representative capacity; that by section 1903 the damages recovered in such an action are exclusively for the benefit of the decedent's husband or wife and next of kin; and that by section 1904 the damages awarded to the plaintiff might be such a sum as the jury, upon a writ of inquiry or upon a trial, or where issues of fact are tried without a jury, the court or referee, deemed to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action was brought; and that by section 1905 the term "next of kin," as used in the foregoing sections, has the meaning specified in section 1870 of the Code. By section 1870 the term "next of kin" includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife.

It is clear that the person for whose benefit damages may be recovered in such an action is such a person as was the next of kin, where no husband or wife survived the decedent; and that ques-

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tion would have to be determined as of the time of the death. It was not intended to be implied from anything that we said that the damage sustained by any person other than one occupying that relation to the deceased could be recovered in such an action. The person or persons who are the next of kin of the decedent are ascertained immediately upon the decedent's death. Whatever pecuniary damage such person sustained in consequence of the death can be recovered in an action brought by the personal representatives of the deceased, and although the death before the trial of the action of one originally entitled to the recovery would have a material effect upon the amount of damage, if damage was caused to such person between the time of the decedent's death and the time of his own death prior to the entry of final judgment in the action, such damage is recoverable in the action, and is given to the personal representatives of the deceased whose death caused the injury, and from a recovery by the express terms of the statute the plaintiff is entitled to deduct expenses of the action and commissions.

We make this statement for the purpose of avoiding any misconception of the scope of our decision.

The motion should be granted.

PATTERSON, J., concurred ; VAN BRUNT, P. J., concurred in result ; BARRETT and McLAUGHLIN, JJ., took no part.

Motion granted.

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CECELIA TOPLITZ and SELINA LISNER, Respondents, v. LOUIS BAUER and Others, as Executors, etc., of CHARLES BAUER, Deceased, Appellants, Impleaded with THE MUTUAL LIFE INSURANCE COMPANY of New York and ROSA LISNER.

*Action in equity to set aside transfers of a life insurance policy — on a failure to establish an equitable cause of action, a money judgment at law is improper — a defendant cannot by answer interject into the equitable action a new legal cause of action for conversion available only against co-defendants and enable the plaintiffs to recover judgment thereon — consideration of an agreement to postpone payment.*

Where the complaint in an action alleges simply a single equitable cause of action to set aside transfers, alleged to have been obtained by fraud and duress, of a policy of life insurance, made by the plaintiffs, the beneficiaries thereunder, to one of the defendants, and subsequent transfers made by such defendant and

by others, resulting in its final transfer by the last assignee (since deceased) to the insurer and a subsequent cancellation of the policy by such insurer, the court must, upon the failure of the plaintiffs to prove their cause of action and to show that the transfers in question were void, dismiss the complaint.

In such a case, in the absence of suitable allegations, the court has no authority to grant, against the executors of the deceased assignee, a money judgment based upon the theory that he, by his acts, converted the policy.

A defendant cannot in such a case, by her answer, set up and interject into the equitable action a purely legal cause of action for a conversion of the policy of insurance, which, if it existed at all, was vested in the defendant at the time the action was brought, such cause of action being alleged to have arisen in her favor out of her dealings with the assignee, since deceased, who transferred the policy to the insurance company, and whose executors are made parties defendant to the action, and which is available only against them; and by such allegations create a transfer of such cause of action to the plaintiffs, thus entitling them to recover upon an entirely different cause of action from that alleged in the complaint.

*Seem*, that where a complaint alleges facts which would constitute a cause of action, either at law or in equity, and it appears upon a trial, before a court of equity, that the plaintiff is not entitled to equitable relief, the court may in certain cases retain the action and order it to be tried as an action at law.

The consideration necessary to sustain an agreement to extend the time of payment of an obligation, considered.

APPEAL by the defendants, Louis Bauer and others, as executors, etc., of Charles Bauer, deceased, from a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 27th day of January, 1897, upon the decision of the court rendered after a trial at the New York Special Term.

*Wm. B. Hornblower*, for the appellants.

*Alexander Blumenstiel*, for the respondents.

*Louis Marshall*, for the respondent Rosa Lisner.

INGRAHAM, J. :

The action was commenced on the 13th of December, 1893, against the defendants the Mutual Life Insurance Company, Charles Bauer and Rosa Lisner. Subsequently, and on the 24th of December, 1894, Charles Bauer died, when the action was continued against the appellants as his executors, and the supplemental complaint was served on the 25th of March, 1895. The complaint alleged the issuance by the Mutual Life Insurance Company of a policy of insurance upon the life of one Charles Lisner, the father of

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the plaintiffs. This was an ordinary life policy, insuring the life of George Lisner in the sum of \$8,000, the amount thereof payable to the plaintiffs in this action, the daughters of the said George Lisner; that, on the 22d day of July, 1888, the plaintiff Cecilia Toplitz, then twenty-two years of age, executed and delivered an assignment of her interest in this policy to the defendant Rosa Lisner, and that said assignment was procured by the said George Lisner, the insured, by undue influence, coercion and compulsion, and without paying to her any consideration therefor; that on or about the 27th day of July, 1888, the plaintiff Selina Lisner, then an infant over the age of fourteen years, petitioned for the appointment of a general guardian, which petition was procured from her by her father by duress and fraud, and that thereafter the surrogate of the county of New York appointed the said George Lisner, her father, as her guardian, and that on the next day, the 28th of July, 1888, the said George Lisner, purporting to act as her guardian, did assign and transfer the said infant's interest in this policy to the defendant Rosa Lisner, and that the said assignment was void as to this plaintiff. The complaint further alleges that the policy was subsequently assigned by said Rosa Lisner to one Gillis, as security for a loan of money; that subsequently the said Gillis retransferred the said policy to the defendant Rosa Lisner; that subsequently the said Rosa Lisner assigned the said policy to the defendant Charles Bauer, as collateral security for a loan of \$1,100 to the said Rosa Lisner; that that loan not being paid on the 13th of October, 1893, the said Charles Bauer, without any authority whatever from the plaintiffs, or any one in their behalf, unlawfully and wrongfully surrendered to the defendant the Mutual Life Insurance Company of New York the said policy for cancellation, receiving from said company as a consideration the sum of \$1,494; that, upon the plaintiffs discovering the foregoing facts with reference to the surrender and cancellation of said policy, these plaintiffs, as well as the defendants Rosa Lisner and George Lisner, repudiated the action of the said Bauer, notified the said insurance company of such repudiation and tendered to the said defendant the Mutual Life Insurance Company the amount of money which it is alleged to have paid to the said Charles Bauer in consideration of the said surrender and cancellation, and demanded that the said defendant corporation should reinstate said policy; and

that they also tendered on behalf of the plaintiffs, as well as on behalf of the said Rosa Lisner and George Lisner, to the said Charles Bauer the sum claimed by him to be owing on account of the loan alleged to have been made by him, with interest thereon to the date of such tender, and demanded that he should restore and deliver up the said policy to these plaintiffs upon payment to him of the amount claimed to be due and owing to him, but that the said Bauer refused to accept the same, and declined to deliver up said policy, claiming that the same had been surrendered to and canceled by the said defendant corporation; that the said assignment of the policy of insurance, as well as the surrender to and cancellation thereof by the said insurance company, was unlawful and void as against these plaintiffs, as well as against the defendant Rosa Lisner; that the delivery up of the said policy by the said Charles Bauer was a fraud upon these plaintiffs and the defendant Rosa Lisner, practiced by the said Charles Bauer, and a wrongful conversion of said policy, to the knowledge, as these plaintiffs are informed and believe, of the said insurance company; that after the commencement of this action, in December, 1894, the said Charles Bauer died leaving a last will and testament, and that on or about January 17, 1895, the said will was duly admitted to probate by the surrogate of New York county; that the said defendants were duly appointed executors under said will, and letters testamentary were duly issued to them, and that the action was duly continued against the said executors in the place and stead of the said Charles Bauer. The complaint demanded judgment that the surrender and cancellation of said policy be set aside and adjudged null and void and of no effect as against these plaintiffs or as against the defendant Rosa Lisner; that the said policy be adjudged to be in full force and effect, the same as though the said attempted assignment and the alleged surrender and cancellation had not been made; that the plaintiffs be adjudged not to have parted with or to have been divested of their rights and interests under the said policy; and that the plaintiffs have such other and further relief in the premises as may be just and proper, together with costs of this action.

It will be seen that the cause of action thus alleged was purely of an equitable character. The complaint alleges the execution of the transfers, but alleges that the same were voidable at the election of

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the person or persons on whose behalf the transfers had been made, and it is sought to have such transfers adjudged void and the said policy retransferred to the plaintiffs, or the plaintiffs vested with the title to it which had become divested by virtue of these transfers; and the aid of a court of equity is asked to accomplish that result.

Upon this complaint, and the answers interposed by the defendants, the action was brought on for trial at a Special Term of the court, and has resulted in a judgment in favor of the plaintiffs against the executors of Charles Bauer for a sum of money, the value of the policy, upon the ground that the said Bauer converted the policy to his own use, the decision expressly holding that the transfers were not fraudulent and void and that the plaintiffs were not entitled to have them so declared. Thus, the court, having adjudged that the plaintiffs had no right to the interposition of a court of equity to set aside these transfers, and that the transfers could not be set aside, adjudged that the plaintiffs were entitled to recover for the value of the policy, upon a conversion of it by the appellants' testator, thus granting to the plaintiffs a judgment against the defendants for the conversion of property which the court held had been transferred by or on behalf of the plaintiffs, and that the transfers were not invalid or voidable. This somewhat peculiar result has been arrived at in face of the fact that, if such transfers were not set aside, the plaintiffs had no possible interest in the policy in question, and had no possible right to recover a judgment for its conversion. These appellants had the right to a trial by jury for this demand against them for a conversion of the property, and it would seem to be perfectly clear that if the equitable cause of action alleged in the complaint failed, a court of equity had no right to grant a judgment against the defendants in favor of the plaintiffs upon a purely legal cause of action for a conversion of the property. The cause of action being purely of an equitable nature, the plaintiffs were entitled to have this action tried by a court of equity, and no objection to such a method of trial, and no demand for a trial by jury, could have been available to the defendants, as the cause of action stated in the complaint, being equitable in its character, was necessarily triable before the court without a jury.

Since the consolidation of the courts of equity and law in one



court, the distinction between actions in equity and actions at law has been uniformly maintained, and although both actions are tried in the same court, the methods of trial are as distinct as before the consolidation. The Constitutions of the State since 1777 have expressly provided that the right of a trial by jury, as it existed at that time, should remain inviolate forever; and that right to trial by jury has been enforced by the courts of this State in all cases in which it existed at the time of the adoption of the Constitution in 1777. A class of cases exists in which the same facts would give rise both to a cause of action at law and in equity; and where such facts are alleged as constituting a cause of action, there has been a certain amount of confusion as to the method of trial and the judgment which a court after such a trial could render. Under our system of pleading, where it is required that the complaint shall allege the facts relied upon to sustain the cause of action sought to be enforced, with a demand for the judgment to which the plaintiff is entitled, it is often difficult to determine whether or not the cause of action alleged is one purely equitable or purely of a legal character. These cases, however, must be distinguished from a class of cases where the action itself is purely equitable; but facts are alleged that show that, in consequence of some act of the defendant, the only judgment that can be effectual will be in an action for a recovery of a sum of money. Such cause of action is illustrated by that for a specific performance of a contract to convey real property where the defendant, since the beginning of the suit has, by a conveyance of the property contracted to be conveyed to others, placed it out of his power specifically to perform the contract. In such a case it has been held that the action does not lose its equitable character because of this act of the defendant, and that a court of equity has power, upon ascertaining that the equitable cause of action existed, to enforce that equitable cause of action by giving to the plaintiff a judgment for a sum of money. Cases enforcing this principle are numerous. One of the principal ones in this State in which that question is discussed, is *Sternberger v. McGovern* (56 N. Y. 12). That action was brought to enforce a contract by which, in substance, the plaintiffs agreed to sell to the defendant certain premises in the city of New York for the price of \$125,000, and the defendant agreed to sell and convey to the

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plaintiffs certain premises in Mott Haven for \$82,500. The plaintiffs asked for the appointment of a receiver, that the property in the city of New York be sold and the net proceeds paid to plaintiffs upon the amount due for purchase money, and for a judgment against the defendant for \$105,000, with interest, or for such other relief. Upon the trial it appeared that the plaintiffs attended at the time and place specified with the deed of the New York city property, executed in accordance with their contract; that the defendant did not appear for the reason that his wife refused to join with him in a deed of the Mott Haven property. The Special Term found that as to the property in New York, which the plaintiffs agreed to convey to the defendant, they were entitled to a specific performance of said agreement; that the defendant should accept the conveyance so tendered, and pay the consideration money of \$125,000, in the manner specified in the agreement, and that the plaintiffs should have a lien on said premises for the payment of the amount of such balance, and that such premises should be decreed to be sold to pay the same. The General Term reversed this judgment and dismissed the complaint, without prejudice to any other action which the plaintiffs might be advised to commence. A majority of the Court of Appeals reversed both the decision of the Special and General Terms and ordered a new trial. GROVER, J., in delivering the opinion of the court, said: "The Special Term held that the contract of the plaintiffs to sell and convey to the defendant the Thompson street property for \$125,000 was an independent contract, not affected by that part relating to the Mott Haven property, otherwise than by giving the defendant the right of paying a part of the \$125,000 by conveying the same to the two plaintiffs at the price specified;" that "the General Term construed the contract as entire; in substance one for the exchange of the one property for the other, and the giving the bond and mortgage by the defendant to the plaintiffs upon the Thompson street property as the mode by which the estimated excess of the value of that over that of the Mott Haven property was to be adjusted." It was held that if this was a true construction, it was obvious that a specific performance of the contract as to the Thompson street property could not be enforced against the defendant while he was unable to perform as to the Mott Haven property. The construction of the

contract by the General Term was adopted, and for that reason the judgment of the Special Term was erroneous; that upon the facts found by the Special Term the plaintiffs were not entitled to the specific performance of the contract or any part of it; and that the plaintiffs must resort to their legal remedy for the damages, if any, that they sustained from the defendant's breach of the contract. Upon the discussion, however, as to whether the General Term was right in dismissing the complaint, or should have ordered a new trial instead, it was held that when a complaint states facts giving an equitable cause of action and also a legal cause of action, arising out of the same transaction, the party is entitled to have both tried, if necessary to obtain his rights; that that was that case; and where the facts giving both legal and equitable relief were alleged in the complaint and the action was tried as an action in equity, and where the plaintiff failed to show that he was entitled to equitable relief, he then had the right to a trial of his claim for damages sustained for a breach of his contract; and, although it was true that a different mode of trial was necessary, the equitable cause of action being tried by a court without a jury, and the legal cause of action being necessarily tried by a jury, the equitable cause of action could be tried by the court or referee, but the action for damages must be tried by a jury. In this opinion three judges concurred. Judge ALLEN concurred in the result upon the peculiar circumstances of the case, the three other judges not voting. It will be seen that a case was presented where the complaint itself alleged facts sufficient to sustain a cause of action in equity, and also sufficient to sustain a cause of action at law. The equitable cause of action was tried, and in that the plaintiff failed as upon the facts proved the plaintiff was not entitled to the interposition of equity. The decision of the three judges seems to hold that in such a case, where facts sufficient to sustain both causes of action were alleged, when the equitable cause of action was disposed of the parties could then try the legal cause of action as though that were the only cause of action alleged and the judgment thereupon obtained the only judgment demanded.

A somewhat different question was presented to the Court of Appeals in *Wheelock v. Lee* (74 N. Y. 495). There the complaint alleged five causes of action. Four were common-law causes of

action, upon which either party was entitled to a trial by jury. The fifth cause of action was purely equitable. It was held that this joinder of legal and equitable causes of action by the plaintiff did not deprive the defendant of the right of trial by jury. The court say: "Where the complaint is framed solely for equitable relief, and the action is tried as an action in equity, the court, on finding that the plaintiff is not entitled to any equitable relief, but that the facts would warrant an action for damages which he has not alleged or claimed, cannot order judgment for such damages. An opportunity must have been afforded to the defendant to claim a jury trial on that ground of action." And, speaking of a claim that the respondent waived the right to trial by a jury by proceeding with the trial at Special Term without objection, the court say: "The case in one of its aspects was triable at Special Term, and had the plaintiff elected to rely solely on his equitable cause of action he could have proceeded with the trial there;" and it was held that the defendant, by proceeding with the trial in such an action at Special Term, does not waive his right to a trial by jury for a cause of action which is different from that to enforce which the action is brought, although upon the facts adduced at the Special Term it would appear that the plaintiff would be entitled to some such relief.

The question was also before this court in the case of *Green v. Stewart* (19 App. Div. 201). That case was in its general character much like the action now under review. That suit was brought on the equity side of the court upon an agreement that a certain conveyance from the defendant to one Weiss was fraudulent; and the relief demanded was that such conveyance be set aside as fraudulent and void as against the plaintiff, and that the defendant Stewart be compelled specifically to perform his agreement to convey the premises to the plaintiff. Upon the trial the plaintiff failed to establish a right to have the conveyance from Stewart to Weiss set aside as fraudulent. The court dismissed the complaint as to Weiss, but retained the case as against Stewart for the purpose of enabling the plaintiff to prove his damages after it had been established that he was not entitled to relief on the equitable side of the court. Upon appeal this was held to be error; that when the plaintiff had rested without establishing any right to relief on the equity side of the

court, and it became apparent that the only remedy he ever had was at law, it became the duty of the court, in view of the answer of the defendants, to have dismissed the complaint as to the defendant Stewart as well as to the defendant Weiss.

These three cases, I think, establish the principle which should be applied by a trial court, that where a complaint alleges facts sufficient to sustain a cause of action in equity only, and such an action is brought on for trial at Special Term as an equitable action, if the plaintiff fails to prove the facts entitling him to relief in equity, it is the duty of the court to dismiss the complaint, leaving the plaintiff to commence an action at law to recover for a legal cause of action, if any exists in his favor against the defendant. Where a complaint alleges facts which would constitute a cause of action either at law or in equity, and where upon the trial before a court of equity it appears that the plaintiff is not entitled to equitable relief, the court may then, in certain cases, retain the action and order it to be tried as an action at law to enforce the legal cause of action which the facts alleged in the complaint would show existed in favor of the plaintiff.

In this action it is apparent that the complaint alleges a single cause of action, which is equitable in its character — an action to set aside the transfers of this policy of insurance by the plaintiffs to the defendant Rosa Lisner, and the subsequent transfer by Rosa Lisner to Charles Bauer, and the cancellation of the policy by the insurance company. The allegations of the complaint would not justify a cause of action for a conversion of the policy. There is no allegation as to the value of the policy; there is no allegation of damage sustained by the defendant by reason of the conversion. There is no allegation that the legal title to this policy was vested in the plaintiffs, or that the plaintiffs were entitled at law to enforce the policy, the only allegation being that a transfer valid upon its face was void for fraud or duress, and that the plaintiffs were entitled to a judgment setting aside such transfers and the cancellation based thereon. The trial court decided that the plaintiffs' equitable cause of action was not proved, and from that decision the plaintiffs have not appealed. We must assume that the court properly decided that question. It was then the duty of the court to have dismissed the plaintiffs' cause of action. The only cause of action alleged in

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the complaint, equitable in its nature, failed. The court, however, not only decided that the plaintiffs were not entitled to judgment for the cause of action alleged in the complaint, but held that the plaintiffs were entitled to a money judgment for a conversion of the property, although holding that the plaintiffs were not the owners of the property and proceeded to award a money judgment for the damage sustained by such conversion. It seems to us entirely clear that such a judgment is absolutely unauthorized and cannot be sustained.

In this discussion of the case I have not considered the allegations in the answer of the defendant Rosa Lisner, as it seems that these allegations are entirely ineffectual as conferring any right upon the plaintiffs which they did not have at the commencement of the action and had not alleged in the complaint. The answer of the defendant Rosa Lisner has attempted to introduce quite a novel practice which, if successful, would create a revolution in judicial procedure. She substantially admits the allegations of the complaint as to the fraud practiced upon the plaintiffs, and alleges the transfer of this policy of insurance to Bauer as collateral security for the payment of a loan, and that when that loan became due the said Bauer extended the time of payment thereof from time to time until the 10th day of June, 1893; that on or about that date he again extended the time of payment until a time subsequent to October 13, 1893; that before such extended time for the payment of principal or interest had expired, and on or about the 13th day of October, 1893, and without giving notice to this defendant or to said George Lisner of his intention so to do, and without making a demand upon them, or either of them, for the repayment of said loan or the accrued interest thereon, the said Charles Bauer wrongfully and unlawfully surrendered the aforesaid policy to the defendant insurance company, accepting therefor, as this defendant was informed by the said Bauer and the insurance company, the sum of \$1,494. Her answer further alleges that she repudiated this surrender; that such surrender was a fraud upon her practiced by the said Charles Bauer and a wrongful conversion of the policy; that subsequently, and in April, 1894, the insured, George Lisner, died; that the plaintiffs gave notice of such death to the company, furnished to it due proof thereof, and demanded the payment of the amount provided to be paid upon the policy upon the death of said George Lisner,

which the company refused to pay, and the answering defendant offers to subrogate the plaintiffs to all her rights in and to such policy and in and to all moneys due thereon, so that the wrong heretofore committed against them may be righted, and offers to pay the amount paid by the insurance company and also whatever sum of money may be due and owing to Charles Bauer on account of the loan. Then this defendant demands judgment against her co-defendants; that the surrender of the policy and the cancellation thereof be set aside and declared null and void; that the said policy be adjudged to be in full force and effect as though such surrender and cancellation had not been made; that the defendant may be adjudged not to have parted with or been divested of her rights and interest under said policy, except as collateral security for the loan aforesaid, and that, in case the plaintiffs shall fail to establish their title to said policy, they be subrogated to this defendant's rights, and that the co-defendants may be adjudged to pay them the amount which under said policy may be due to this defendant, with costs, and that she have other and further relief. That answer appears to have been served upon the other defendants, who answered it.

The judgment does not proceed to enforce any claim that Rosa Lisner had against these other defendants, but awards judgment to the plaintiffs against the defendant executors for the amount of the policy. It seems to us that the idea of the pleader who prepared this answer of Rosa Lisner, that by such allegations a cause of action could be transferred to the plaintiffs or that they could be subrogated to such a cause of action which, if it existed, was vested in a defendant at the time the action was brought, and which would entitle the plaintiffs to recover upon an entirely different cause of action from that alleged in the complaint, is fundamentally unsound and violates the settled rules governing judicial procedure. It has been universally held that for a plaintiff to maintain a cause of action, that cause of action must have existed at the time of the commencement of the action and must have vested in the plaintiff before the action was brought. In many cases supplemental complaints have been allowed to be filed alleging facts which have happened since the service of the original complaint and which would tend to increase the damages or to extend the relief to which the plaintiff was entitled. The allowance, however, of a supplemental pleading

is in all cases based upon the existence of a cause of action at the time the original pleading was served, and upon the necessity of such a supplemental pleading to enable the court to dispose at one time of all the questions arising as to the nature of the relief to be given upon the cause of action alleged in the original pleading. In no case that I know of has it been held that a plaintiff could maintain an action to enforce a cause of action which did not accrue to him until after his action was commenced.

The cause of action for which this judgment is given, if it existed at all when this action was commenced, was one in favor of the defendant Rosa Lisner against her co-defendants, the executors of the estate of Charles Bauer. It was an action of a purely legal character for a conversion of securities held by the said Bauer as collateral, he having disposed of them when, under his contract between himself and the defendant Rosa Lisner, he was not entitled to. For such a cause of action these defendants appellants would be entitled to a trial by jury. The bringing on for trial of the cause of action alleged in the complaint of the plaintiffs, which was entirely different from that alleged in the answer of Rosa Lisner, at a Special Term, or the failure to demand a jury trial, could not be held as a waiver of this right of the defendants to have that cause of action as between themselves and Rosa Lisner tried by a jury. The issue between the executors and the plaintiffs was one which had to be tried by a court of equity. No protest or objection to such a trial could have availed the executors, and no express consent to subrogate the plaintiffs to any cause of action which the defendant Rosa Lisner had against the executors, which was alleged in an answer interposed to a supplemental and amended complaint, could have the effect of vesting the plaintiffs with a cause of action which, when the action was brought, was not vested in them. This is especially so where such a cause of action is not alleged in the complaint and is not the basis for the application to the court for relief.

Under the view which we have taken on this subject, it is not necessary for us to determine whether Rosa Lisner either alleged in her answer or proved upon the trial any cause of action against these executors. Her right to recover is based upon a contract



which she testified was made between herself and Charles Bauer, or Louis Bauer acting as his agent, a few days before the 13th day of October, 1893, and by which it is alleged that Charles Bauer, or Louis Bauer as his agent, stated to her that Charles Bauer would wait before sacrificing her securities until she procured money to pay off the loan from her brother in Washington, and that she need not be anxious or worry as he would do nothing. It will be noticed that this contract testified to is not the contract alleged in the answer of Rosa Lisner. She there alleges an agreement made on the 10th of June, 1893, to extend the time of the payment of this note to a period beyond the thirteenth day of October, when the alleged conversion took place. If this agreement is to be treated simply as a contract extending the time of payment, it is quite clear that it is not enforceable on the ground that it was without consideration. Bauer had extended the time of the payment of this note for years, and it is not denied that in March, 1893, at the time the extension expired, Bauer demanded payment of the indebtedness and refused further extension. The Lisners, however, succeeded in inducing him to delay taking proceedings to enforce such payment until after Charles Bauer sailed for Europe in June, and then succeeded in inducing his agent to postpone such proceeding from time to time until Charles Bauer returned from Europe in October. It is not disputed that all this time Charles Bauer or his agent, Louis Bauer, were insisting upon the payment of the note and postponing the proceedings from day to day upon the promises of the defendants Lisner to pay; but, according to the testimony of the Lisners, in October they suddenly assumed an entirely different attitude, exhibiting then, for the first time, a great desire to prevent Rosa Lisner from becoming anxious, and giving her to understand that the payment of this note would be indefinitely extended until she was able to procure money with which to meet it from some other source. It appeared from the evidence that during the summer and fall of 1893 there was a severe financial disturbance, and that money was almost impossible to procure; but under the circumstances it seems quite clear that such an expression of intention as was testified to on the part of Charles Bauer and Louis Bauer is not sufficient to establish a binding contract which would extend the time of the payment of the note indefinitely, or prevent the Bauers

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from enforcing it. If Charles Bauer had commenced an action upon the note on the thirteenth day of October, it would seem quite clear that this alleged agreement would not have been a valid defense to that action. Any right which Rosa Lisner could possibly have as against Charles Bauer would be upon the ground that what he said prior to the thirteenth of October was a waiver of his right to enforce his contract with the Lisners, and sell the property held by him as collateral security, without a demand for the payment of the money, or notice that he intended to enforce the terms of his contract; or that what he had said estopped him from enforcing this contract without notice to the Lisners. But no such cause of action was alleged in the answer of the defendant Rosa Lisner. No mention of such agreement is made in the complaint, and the allegation in the answer of Rosa Lisner is, that the contract was made in June, extending the time beyond the thirteenth of October, when the alleged conversion took place; and what she appears to seek in this manner as against the executors of Charles Bauer is to enforce this contract made in June. Whether or not such a contract can be enforced if made, or whether this appropriation by the Bauers of this policy of insurance was a conversion thereof, or gave to Rosa Lisner any right of recovery against Bauer or his estate, must be determined in an action brought for that purpose; and such a question, we think, cannot be injected into this equitable cause of action, which is to enforce a claim by these plaintiffs to this policy of insurance, in which the court below has decided they had no interest.

We think, therefore, that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellants to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellants to abide event.

EDWARD C. SHEEHY, Respondent, v. SAMUEL McMILLAN, as President, and Others, Defendants; THE BRONX GAS AND ELECTRIC COMPANY, Appellant.

*Action by a taxpayer to prevent waste—injunction to restrain an electric company from unlawfully excavating in a public park, in order to set poles—failure to allege that city officials intend to do an unlawful act.*

Where the complaint in an action, brought by a taxpayer under the statutes permitting him to sue in order to prevent a waste of or an injury to property, funds or estate of a municipality (Laws of 1881, chap. 581, as amended by Laws of 1892, chap. 301), and to prevent any illegal action by the officers thereof (Code Civ. Proc. § 1925), alleges that the principal defendant, a gas and electric company, is, without warrant or authority of law, making excavations in a public park in order to set poles for stringing wires, to the injury and waste of the property of the municipality, and that certain other defendants, as commissioners, respectively, of the city department of public parks and of its board of electrical control, have permitted or are permitting this alleged waste of city property, but does not allege that either set of officials has granted or proposes to grant the gas and electric company any permission, license or franchise to do the acts complained of, or that these officials have knowledge, either actual or constructive, of such acts, the complaint is insufficient, and an injunction granted *pendente lite* must be vacated.

The cause of action attempted to be alleged in the complaint in such a case cannot be perfected, for the purpose of sustaining an injunction order, by the aid of other papers used on a motion therefor.

*Semble*, that the terms "waste" and "injury," as used in the statutes above mentioned, do not comprehend individual acts, but only illegal, wrongful and dishonest acts of public officials.

APPEAL by the defendant, The Bronx Gas and Electric Company, from an order of the Supreme Court, made at the New York Special Term on the 30th day of December, 1897, and entered in the office of the clerk of the county of New York, continuing an injunction *pendente lite*.

*Alfred T. Cruikshank*, for the appellant.

*Joseph I. Green*, for the respondent.

McLAUGHLIN, J. :

The plaintiff, as a taxpayer, has instituted this action to restrain the commissioners of the department of public parks and the commissioners of the board of electrical control of the city of New

York from issuing a permit to the Bronx Gas and Electric Company to excavate, erect poles or string electric wires in one of the public parks of the city, and also to restrain the gas company from doing such acts. He has, during the pendency of the action, accomplished by an order what he seeks to accomplish ultimately by a judgment. From this order the defendant gas company alone has appealed. It insists that the order must be reversed, because the complaint does not state facts sufficient to constitute a cause of action against the defendants or any of them. The plaintiff, on the other hand, insists that his right to maintain the action is conferred by section 1925 of the Code of Civil Procedure, as supplemented by chapter 531 of the Laws of 1881, as amended by chapter 301 of the Laws of 1892, and that he has brought himself within the provisions of this section and the statute by the complaint served.

The section of the Code referred to provides that "An action to obtain a judgment, preventing waste of or injury to the estate, funds or other property of a county, town, city or incorporated village of the State, may be maintained against any officer thereof, or any agent, commissioner or other person acting in its behalf, either by a citizen, resident therein, or by a corporation who is assessed for and is liable to pay, or, within one year before the commencement of the action has paid, a tax therein." Chapter 531 of the Laws of 1881, as amended by chapter 301 of the Laws of 1892, so far as the same is applicable to the question under consideration, provides that "all officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in this State, and each and every one of them, may be prosecuted, and an action or actions may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good any property, funds or estate of such county, town, village or municipal corporation," by any person whose assessment shall amount to \$1,000, and who shall be liable to pay taxes thereon in the county, town, village or municipal corporation, to prevent the waste or injury of whose property the action is brought.

Upon examining the complaint it is found that the plaintiff alleges that he is a resident and taxpayer of the city of New York; that

his assessment amounts to more than \$1,000 upon which he is liable to pay taxes, and within one year prior to the commencement of this action he has paid taxes on more than that sum; that Pelham Bay Park is located in and is the property of the city of New York; that all the defendants, except the gas company, constitute either the board of commissioners of the department of public parks or the board of electrical control of such city; that the defendant gas company, a domestic corporation, "is wrongfully and unlawfully, and without warrant or authority of law, and without warrant or authority of any person or board having such authority to give, is excavating along the roads, avenues, streets or highways of Pelham Bay Park \* \* \* for the purpose of erecting poles to string electric wires or conductors thereon, and is and has excavated in many places, \* \* \* and has erected poles for the said purpose \* \* \* and that the acts and wrongful and unlawful conduct and actions of the defendant, the Bronx Gas and Electric Company, is without authority of law, and is done without authority, or lawful authority of any board or person having the right to give such authority \* \* \* and that the actions of the said defendant tend to waste and injure the property of the said" city; that certain of the defendants, "as commissioners of the department of public parks \* \* \* by reason of the facts hereinbefore set forth \* \* \* have permitted the waste of, and injury to," the property of the city; that certain other defendants, "composing the board of electrical control \* \* \* by reason of the facts herein set forth \* \* \* are suffering and permitting the waste and injury to the property of" the city; that the plaintiff has no adequate remedy at law. The judgment demanded is that the gas company be perpetually enjoined and restrained from excavating, erecting poles or stringing electric wires in said park, and that the other defendants, as commissioners of the department of public parks and as commissioners of the board of electrical control, be restrained from granting any authority or permission to the gas company to make such excavations, erect such poles or string such wires.

It will be observed that there is no allegation in the complaint, or the statement of any fact from which it can be inferred, that the defendants, as commissioners of the department of public parks, or

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as commissioners of the board of electrical control, have granted, threatened or intend to grant, any permission, license or franchise to the gas company to do the acts of which the plaintiff complains. It does not even appear that these officials have knowledge, either actual or constructive, of what the gas company has done or is now doing. Does the complaint, in the absence of such allegation, state a cause of action? I think not. To authorize an action against a public official under the section of the Code or the statute referred to, the act of which the plaintiff complains and which he seeks to restrain must be an illegal official act. (*Potter v. Collis*, 19 App. Div. 392.) The purpose of the statute is to prevent, not the acts of individuals, but illegal acts of public officers. The terms "waste" and "injury," as used in the statutes, do not comprehend individual acts, but only illegal, wrongful and dishonest acts of public officials. (*Tulcott v. The City of Buffalo*, 125 N. Y. 280; *Ziegler v. Chapin*, 126 id. 348.)

In *Ziegler v. Chapin* (*supra*) the Court of Appeals said: "But the action authorized by section 1925 of the Code is one which the taxpayer may bring against the public officer because of some fraud or bad faith on his part, or to restrain some illegal action. \* \* \* If the officer is honest and faithful no suit against him is needed. The taxpayer may explain to him the facts and discover to him the fraud, and the courts are open for his protection and the means of redress are at hand. It is only when, in the face of explanation and knowledge, he still refuses to act, and persists in carrying out the wasteful contract, that an action against him is needed, and then it rests upon his misconduct, upon his collusion and fraud, which must be alleged and proved. The Legislature could not have intended that the courts should supply intelligence and prudence to incapable officials at the demand of a taxpayer, but manifestly did intend to give the latter protection against the dishonesty or fraud of the municipal agents." Here no acts, legal or illegal, honest or fraudulent, on the part of the officials sought to be restrained are alleged, and it requires neither authorities nor argument to show that an action cannot be maintained to restrain a public official, who has neither done, threatened nor intends to do any act whatever. As well might an action be maintained to restrain or suppress a nuisance before the nuisance had been created, threatened or attempted.

If the complaint does not state a cause of action, then it necessarily follows that the plaintiff was not entitled to the order appealed from. Before he could obtain an order of this character he was required to show by his complaint that he had a good cause of action, and was entitled to a judgment against the defendants. (Code Civ. Proc. § 603.) The cause of action attempted to be alleged in the complaint cannot be perfected, for the purpose of sustaining the order, by the aid of the other papers used on the motion. The complaint must stand or fall by itself. It must show, independent of the other papers used, a good cause of action. (*McHenry v. Jewett*, 90 N. Y. 58; *Stull v. Westfall*, 25 Hun, 1; *Close v. Flesher*, 8 Misc. Rep. 299.) This it does not do. It follows that the order appealed from must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., BARRETT, PATTERSON and INGRAHAM, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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THE ASSOCIATE ALUMNI OF THE GENERAL THEOLOGICAL SEMINARY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, Plaintiff, v. THE GENERAL THEOLOGICAL SEMINARY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES, Defendant.

*Trusts — transfer of a fund, collected by subscription by an alumni association, to a seminary upon certain conditions — violation of the conditions by the seminary — incorporation of the association vesting the title to the fund in it — right of the corporation to retake the fund from the seminary.*

An unincorporated alumni association of a theological seminary, having pledged itself to the work of establishing a professorship in the seminary, requested the seminary's approval of such work, which approval was expressed in a resolution of its trustees which recognized the association "as agents accordingly, and earnestly commends their agency to the confidence and liberality of the church."

The association thereafter collected upwards of \$25,000 for this purpose, and paid it to the seminary upon certain express written conditions, which conditions

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for several years were recognized and complied with by the seminary in the use of the income of the fund, and the rights of the alumni association therein were also recognized by various other acts on the part of the seminary inconsistent with any claim of ownership thereof by the seminary.

Subsequently, at an annual meeting of the association, by a unanimous vote, the alumni directed that steps be taken to incorporate the association, which was done, every member of the association in good standing at the time of the incorporation being elected, by name and individually, a member of the corporation.

*Held*, that a valid trust was created upon the conditions which the seminary had assented to, which it was estopped from questioning;

That its refusal to comply with such conditions authorized a judgment in favor of the subsequently formed corporation retransferring to it the fund in question;

That the action of the alumni in directing the incorporation of their association was effective to vest the corporation so formed with the title to the fund;

That, under the circumstances of this case, the use of the word "agents" in the resolution of the trustees of the seminary could not properly be given a construction which would make the alumni, at the time the fund was collected, mere agents of the seminary in the collection and payment over to it of this fund.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

The defendant is an educational institution devoted particularly to preparing students for the ministry. It received a charter from the Legislature of this State in 1822, which was amended in 1868. Its government under the charter, as amended, is vested in a board of trustees, whose authority in turn is, during a recess of the board, delegated to a standing committee.

In 1832 certain of the alumni of the defendant organized a voluntary unincorporated association under the name of "The Associate Alumni of the General Theological Seminary of the Protestant Episcopal Church in the United States," the object of which was "to cherish a spirit of mutual interest and union among its members; to advance the cause of theological learning and evangelical truth and piety, and to promote the advantage of the institution" from which its members had graduated. It adopted a constitution which recited the object of its creation, and provided that all graduates of the defendant should be eligible as members, and that the funds of the association, among other things, should be "appropri-



ated to the support of one or more scholarships in the Seminary." In 1836 it appointed a committee to take into consideration the expediency of attempting to establish a permanent fund for one of the professorships in the seminary not then endowed; and at a meeting held the following year it passed a resolution pledging itself to the work of establishing, "as soon as the times will permit," a professorship of pastoral theology and pulpit eloquence. Shortly thereafter the first contribution to the fund which is the subject-matter of this controversy was made by a subscriber paying \$250 into the treasury of the association. In 1839 the association passed a resolution reciting that, in its opinion, it was highly important that the professorship in question should be endowed forthwith, and that, as it had expressed a readiness to assume the responsibility of making an effort in that direction, it requested the approval of the defendant's trustees of its work "for the endowment of the above-mentioned professorship." This action of the association was communicated to defendant's board of trustees, and such board immediately passed a resolution expressing its pleasure at the continued disposition of the association to engage as agents for the purpose of raising the fund, and declaring that it recognized them "as agents accordingly, and earnestly commends their agency to the confidence and liberality of the church." The association then applied itself actively to the work of raising the requisite sum. Contributions were made to it from time to time until 1883, when the total amount which it had received, together with the interest thereon, amounted to upwards of \$25,000. In the meantime the professorship first considered had been endowed by an individual, and that professorship, with the consent of both parties, was abandoned, and another, "to be known as the Alumni Professorship of the Evidences of Revealed Religion," substituted in its place. In 1883, the fund held by the association was deemed sufficient by both parties to accomplish the desired object, and at its annual meeting, held in May of that year, the association offered the fund to the trustees of the defendant upon certain prescribed conditions, which the defendant agreed to. A few days later the alumni association transferred the fund, then amounting to \$25,476.85, to the defendant, which the defendant formally accepted upon the terms offered, and amended its statutes to provide for the professorship thus

created. The following are the terms and conditions upon which this fund was offered and accepted by the defendant :

" 1. That the professorship be designated as the Alumni Professorship of the Evidences of Revealed Religion.

" 2. That such professorship shall be tenable for a period of three years, at or before the expiration of which term, or upon any other avoidance of the office, some other person than the retiring professor shall be nominated and elected.

" 3. That the duties of the professorship shall be limited to the delivery of lectures, extending over a period of three months in each year, the professor not being required to be resident, and not to be a member of the faculty.

" 4. That the right of nomination, on the expiration of the term of the professor, or other occurrence of a vacancy, shall forever belong to the associate alumni and be exercised by them according to such rules as may be from time to time adopted by them.

" 5. That the entire income of the endowment and of such additions as may in future be made to it shall be paid to the professor, or, in case of a vacancy, added to the endowment, provided that in case of a vacancy the standing committee may, with the consent of the associate alumni, or of their executive committee, appoint an acting professor, and assign to him the whole or a part of the income of the endowment as a compensation for his services.

" 6. That a statement of the amount of the fund, its investments and disposition of its income, be annually furnished to the associate alumni by the standing committee of the seminary.

" 7. That these conditions may, at any time, be altered by the joint action of the trustees of the seminary and of the associate alumni."

In May, 1884, Dr. Dean was nominated by the association to be the first incumbent of the professorship thus endowed, and he was unanimously elected by the defendant for a term of three years. During Dr. Dean's term, however, the conditions imposed by the association became irksome to the defendant, and it thereupon entered into negotiations with the association to secure, if possible, its consent to the modification of the conditions. For this purpose a committee was appointed by the defendant, and a committee also appointed by the association. Various conferences took place

between the committees, but finally they agreed upon a modification which they submitted to the respective bodies they represented, in the form of a joint report. The modification they represented was that, at the expiration of the then incumbent, the professorship should become a regular professorship. The report also urged the association to resume its work of soliciting further subscriptions, to the end that the fund might be increased to the sum of \$50,000, which would be sufficient to maintain a regular professorship. This report was satisfactory to the defendant, but not to the association, and it never adopted or approved of it. It directed that the consideration of it be "postponed until the next meeting of the alumni association." This disposition of the report was due to the fact that no action had been taken by the defendant on the nomination made by the association, the year before, of Dr. Hopkins to succeed Dr. Dean. Shortly thereafter the defendant acted upon the nomination of Dr. Hopkins and he was rejected, and the association then nominated Dr. Cady, and in October, 1890, he was elected by the trustees of the defendant.

At its annual meeting in 1891 the alumni association passed a resolution modifying, if the defendant concurred, the conditions attached to the professorship fund, to the extent of making the incumbent eligible for re-election. This action of the association was communicated to the defendant, but it took no action in the matter, except to refer the consideration of the resolution to its standing committee. The year following the association nominated for the professorship Dr. Cady, if the defendant consented to the modification of the conditions attached to the office proposed by the association the year before, and, if it did not consent to such modification, then it nominated Dr. Dix. The defendant then, for the first time, refused to act upon the nomination of a temporary professor, upon the ground that the conditions attached to the office were modified in 1888 so as to create a permanent professorship. It then requested the association to nominate some person for permanent professor, which the association declined to do. The defendant then directed that the income from the fund be accumulated and added to the principal until the association should nominate a permanent professor. This is the situation at the present time.

The alumni association, at its annual meeting in June, 1889, directed a committee then appointed for the purpose to take the necessary steps to incorporate the alumni association, and in obedience to that direction the plaintiff was incorporated in November following under the same name that the association had theretofore borne. Immediately following the incorporation the trustees named in the certificate of incorporation met and organized by the election of officers, and then proceeded formally to elect to membership in the corporation, by name and individually, every member of the alumni association who was in good standing at the time of the incorporation, and the following year all persons who were members of the alumni association at the time of the filing of the articles of incorporation were formally declared members of the plaintiff.

The plaintiff has instituted these proceedings to procure a judgment and a decree of this court: (1) Declaring the defendant's conduct, with reference to the tenure of this professorship, to be a breach of trust; and (2) directing the defendant to take action upon a nomination made by plaintiff, now pending, and if it fails to do so within the time fixed, that it surrender and deliver to the plaintiff the trust fund.

The proceeding is resisted by the defendant mainly upon three grounds: (1) That there has been no breach of trust, because the condition imposed by the alumni association as to the election of a professor for only three years was modified in 1888, and in place thereof a regular professorship substituted, and the delay in filling that position is due entirely to the failure of the plaintiff to make a nomination; (2) that the plaintiff has no interest in the fund; (3) that the plaintiff did not succeed to the rights of the unincorporated association, and, therefore, is not the real party in interest.

*W. H. Rand, Jr.*, for the plaintiff.

*W. H. Harris*, for the defendant.

McLAUGHLIN, J. :

The fund in question was offered to the defendant by the alumni association upon certain conditions, and it was accepted by the defendant "upon the conditions" imposed. A valid trust was thereby created, and the defendant, as a trustee, thereupon became

obligated, both legally and morally, to honestly and faithfully use and apply the fund and income therefrom according to the conditions imposed. Those conditions, so far as the same are in dispute, have never been changed, waived or modified by the alumni association or this plaintiff, its successors in interest. It is true some action was taken by both parties in 1888 towards securing a modification of the conditions, but nothing definite was accomplished. The committee appointed by the association, acting in connection with the committee appointed by the defendant, made a joint report, in which a change was recommended, but the association did not adopt the report or assent to the proposed change. This the defendant understood, because the following year its trustees passed a resolution which recited that the proposed change "not having been officially ratified by the association," should not be considered in force. And one year later it acted upon a nomination made by the alumni association under the original conditions, by electing Dr. Cady for a period of three years.

But it is urged by the defendant's counsel that the alumni association never had any interest in or to this fund; that the fund was derived from contributions made by individuals for the purpose of promoting a specific part of the defendant's work, and that, therefore, the defendant was entitled to take, hold, use and apply the fund and income therefrom, to this work irrespective of the wishes of the association; that there was no consideration for the limitation imposed on the exercise of this right by the defendant; that the fund did not belong to the association, and that, therefore, it parted with nothing on the faith of the defendant's agreement or its assent to the conditions imposed when the fund was transferred. We are at a loss to understand how the defendant could believe or hope that its contentions in this respect would receive the sanction of any court. Honesty and fair dealing requires, when one person has received property from another, under an agreement that he will do something with it, that he should do as he agreed or else return the property to the one from whom he received it. The fund was offered to defendant by the association on certain conditions; the defendant, in order that it might receive the fund, assented to those conditions and agreed to be bound by them. It cannot now be heard to say that the association had no title to or interest in this

fund. If it desired to make such claim, it should have done so when the fund was offered, and not after it had obtained possession of it. But there is no force in the contentions of the defendant in this respect, as a reference to the history of the fund will show. The first mention we find of this fund in the record before us is June, 1836, when the association appointed a committee to consider the advisability of attempting to establish a permanent fund to endow one of the professorships then unendowed. The establishment of such fund was thereafter urged by defendant, and a committee was appointed by it to aid and encourage the association in their proposed undertaking. In June, 1839, the trustees of the defendant, in response to a communication from the association in reference to raising the fund, passed a resolution, upon the language of which the defendant now lays great stress as determining the true relations of the two bodies. The words in the resolution, which are considered by defendant as important, are: "This board \* \* \* hereby recognizes them as agents accordingly, and earnestly commends their agency to the confidence and liberality of the church." Standing alone these words might possibly import or be susceptible of the meaning urged by defendant's counsel, that the association simply acted as agents of the defendant; but when they are considered in connection with the request of the association, which prompted and called out the resolution in which the words are used, it becomes plain that no such inference can be made from them. The association asked "that the board of trustees be requested to give their sanction" to the work of procuring funds for the endowment, and in response to this request a resolution was passed which contained the words quoted. Under all the facts, we do not think these words are entitled to the force contended for by defendant, or, indeed, to any force in determining the title of the fund. And if we were disposed to adopt another view, the defendant's own acts would prevent our doing so. As early as 1841 the defendant recognized the right of the association to possess and control the fund, because it then surrendered to the association, upon its demand a sum contributed, which had been paid directly to the defendant. In addition to this, for many years a portion of the fund was from time to time loaned to the defendant by the association, and on such loans the defendant paid interest. These acts are

inconsistent with a claim of ownership. But in addition to this, we think the acceptance by the defendant of this fund upon the conditions imposed by the association was a recognition of ownership in the association, which the defendant cannot be permitted to deny. If the defendant at that time had raised the question, a judicial determination of the rights of the parties could have been had before the transfer actually took place. The defendant, however, having secured the possession by assenting to the conditions proposed, is estopped from denying the association's title. Thus, Bigelow on Estoppel (4th ed. p. 661) says: "Indeed, it may now be broadly said that when one *sui juris* induces another to contract lawfully with him, or to change his position under circumstances which at the time would justify a man of care and prudence in acting as was done, the person inducing such action, and taking and retaining the benefit of it, can neither in whole nor in part repudiate the effect of his conduct."

It may be said that it is for the best interest of the seminary that the conditions imposed by the association should be changed, or that some modifications should be made in respect to them, but that is a question not for us to consider. The question for us to determine is solely whether the defendant has complied with the conditions prescribed by the donors of the fund, and to which it agreed when it received the same. In this connection the language used by the Supreme Court of the United States (*Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518) is quite pertinent. "This" (the proposed change) "may be for the advantage of this college in particular, and may be for the advantage of literature in general, but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given."

Finally, it is urged that the plaintiff did not succeed to the rights of the unincorporated association, and, therefore, it is not the real party in interest. After a careful examination of the steps taken by the unincorporated association antecedent to the incorporation of the plaintiff, as well as the subsequent recognition by the defendant of the plaintiff's right to control the fund, we have reached the conclusion that the plaintiff did succeed to all the rights of the voluntary association, certainly to the extent of maintaining this proceeding. The action taken by the unincorporated association was

sufficient of itself to transfer to the plaintiff, when incorporated, all its rights. At the annual meeting of the association in 1889 a committee, appointed for that purpose, was directed to take all necessary proceedings to incorporate the association, and, in obedience to this instruction, proceedings were taken which finally resulted in the incorporation of the plaintiff. This, of itself, was sufficient to vest in the plaintiff all the title and interest which the association had in or to the fund. (Bacon Ben. Soc. § 64; *Matter of St. Mary's Church*, 7 S. & R. 517; *Rudolph v. Southern Beneficial League*, 7 N. Y. Supp. 135; *Porter v. Robinson*, 30 Hun, 209; *Beardsley v. Johnson*, 121 N. Y. 224.) The resolution in favor of the incorporation was adopted at an annual meeting by an unanimous vote of all present, and, from that time to this, no member of the association has been heard to complain, or in any manner question what was then done. That the resolution thus passed empowered the committee then appointed to secure the incorporation of the association is clear, and it does not need the citation of any authorities to sustain the proposition.

We, therefore, conclude that when this fund was offered to the defendant a trust was created, which the defendant has violated by refusing to apply and use the fund according to the terms upon which it was offered, and to which it assented when it received the same; and that, in view of the peculiar provisions of the agreement, and the fact that it comes before us on a submission, this court does not deem it practicable to direct a specific performance, but, instead, it remits the parties to their original positions by directing that the defendant pay over and deliver to the plaintiff the fund which it received in 1883, together with any and all accumulations of interest thereon. Judgment to that effect should be directed against the defendant and in favor of the plaintiff, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and INGRAHAM, JJ., concurred.

Judgment ordered for plaintiff, as directed in opinion, with costs.



HENRY A. GOUGE, Appellant, v. MARGARET K. B. GOUGE,  
Respondent.

*Agreement by a wife to pay her husband one-half of the profits on a purchase and sale of real estate — proof required and consideration necessary to sustain it.*

An oral agreement made by a wife with her husband to the effect that she will purchase certain real estate, and whenever it is sold will pay him one-half the proceeds, after deducting the purchase price, cannot be enforced unless its terms and conditions are clearly proven and it is shown to have been based upon a good and valuable consideration — a meritorious consideration is not sufficient.

Where, in an action brought upon the alleged agreement by the husband after a resale of real estate purchased by the wife, it appears that the property was bid in by him in the name of the wife and was paid for with money borrowed by her and by a purchase-money mortgage, and there is no evidence of any definite arrangement before or at the sale (the agreement, if any was made, having been made after the sale), or of any consideration to support the alleged agreement as to the disposition of the proceeds, the complaint is properly dismissed.

APPEAL by the plaintiff, Henry A. Gouge, from a judgment of the Court of Common Pleas for the city and county of New York, entered in the office of the clerk of said court on the 31st day of December, 1895, upon the decision of the court rendered after a trial at an Equity Term of said court, dismissing the complaint upon the merits.

*Oscar Frisbee*, for the appellant.

*Lester W. Clark*, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover one-half of the net proceeds realized from the sale of certain real estate. The plaintiff predicated his right to recover upon an oral agreement alleged to have been made between him and defendant which, in substance was, that she would purchase the real estate, and whenever she sold the same she would pay to him one-half of all she received after deducting the purchase price. The defendant denied making the agreement. The trial court, after hearing the evidence of both of the parties, dis-

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missed the complaint, and in so doing we think no error was committed.

There is little dispute between the parties as to the facts. In 1873 the defendant, the widow of one Russell Bates, from whose estate she was then receiving, and has since received, an income, married this plaintiff, and as husband and wife in 1879 they went into possession, as tenants, of the real estate referred to in the complaint. Soon after their occupancy commenced proceedings were instituted to foreclose a mortgage then thereon, which were prosecuted to and resulted in a judgment directing a sale. The plaintiff attended the sale and bid in the property for the defendant. The memorandum of sale was signed by him for her, and she thereafter received a deed from the referee. The entire consideration was paid by her, a portion of it with money borrowed upon her note from her former husband's estate, and the balance by a purchase-money mortgage. The plaintiff did not pay one cent towards the consideration, and he assumed no obligations whatever in reference to or in any way connected with the purchase. It is, therefore, impossible for us to see upon what theory it could be supposed that the plaintiff had any right to a portion of the proceeds of the sale of this property, which could be enforced either at law or in equity.

It will be observed that the plaintiff does not claim that any arrangement was made between him and the defendant prior to or at the sale, and the trial court found that no such arrangement was made, which finding was entirely satisfactory to the plaintiff, since no exception appears to have been taken to it. The alleged agreement, then, if made at all, was made after the sale, and the record fails to disclose even a suggestion that there was any consideration to support it. Such a contract, if it could be enforced in any event, would have to be based upon a good and valuable consideration. A meritorious consideration alone would not be sufficient. (*Matter of Wilbur v. Warren*, 104 N. Y. 192.) The alleged agreement, according to plaintiff's own testimony, is vague and unsatisfactory throughout. It is uncertain in every respect. It lacks every element necessary to enable the court to enforce a specific performance. To entitle one to a specific performance of an oral contract, partly performed, for the purchase and sale of land, or for an interest in the proceeds derived from a sale, it is absolutely essential, in every

case, that the contract not only should be clearly proved, but that its terms and conditions should be made reasonably certain. (*Dunckel v. Dunckel*, 141 N. Y. 427.) The plaintiff's own evidence, if we accord to it the most favorable consideration possible, utterly fails to establish a contract of this character. The judgment was right and should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Judgment affirmed, with costs.

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JOHN C. L. HAMILTON Respondent, v. AUGUSTUS T. GILLENDER, Appellant.

*Broker's commissions — when not earned.*

In an action brought by a real estate broker to recover commissions, evidence tending to show that, after another broker named Gardiner had written to one Roberts, whom he supposed to be the owner of the defendant's property, a letter proposing an exchange of properties, Roberts sent the letter to the plaintiff, who forwarded it to the defendant, with a suggestion that he had better see Gardiner, and that the defendant subsequently, through an arrangement with Gardiner, for which Gardiner received commissions, effected the exchange proposed, is insufficient to show that the plaintiff was the efficient and procuring cause of the exchange and, therefore, entitled to commissions upon it.

APPEAL by the defendant, Augustus T. Gillender, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of February, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 28th day of January, 1897, denying the defendant's motion for a new trial made upon the minutes.

The action was brought to recover commissions alleged to have been earned by the plaintiff as a real estate broker in making a sale or exchange of property belonging to the defendant.

*Ezekiel Fixman*, for the appellant.

*Alfred A. Cook*, for the respondent.

McLAUGHLIN, J. :

We think the judgment should be reversed. The record fails to disclose any evidence from which the jury could find that the plain-

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tiff performed any service in bringing about a sale or exchange of the defendant's property which legally entitled him to a commission. What he claims to have done is this: One Gardner, a real estate broker, wrote a letter to one Roberts, whom he at the time supposed was the owner of the defendant's property, saying that he had city property which he would like to exchange for it. Roberts sent this letter to the plaintiff, who forwarded it to the defendant with a letter suggesting that the defendant call and see Gardner. The defendant thereafter saw Gardner, and through an arrangement entered into with him, and for which Gardner received a commission, he exchanged his property for property owned by Bingham Brothers. This is all the plaintiff did, and it requires the citation of no authorities to show that, under such circumstances, commissions were not earned.

To entitle a broker to commissions he must prove that he found a purchaser who was ready and willing to purchase upon terms satisfactory to his principal, and that, by reason of his services, the buyer and seller were brought together. (*Gerding v. Haskin*, 141 N. Y. 514.) It is essential that the agreement, as finally concluded, should be procured or brought about by the broker. (*Baker v. Thomas*, 33 N. Y. Supp. 614.) In all actions of this character the plaintiff must establish, by satisfactory evidence, that he did something substantial; that he was the efficient and procuring cause of the sale. (*Sibbald v. Bethlehem Iron Company*, 83 N. Y. 378; *Colwell v. Tompkins*, 39 N. Y. Supp. 478.) Here the plaintiff did not find a purchaser; he did not even bring about a meeting between the defendant and Bingham Brothers; he never spoke to Bingham Brothers on the subject of a sale or exchange. Gardner was Bingham Brothers' broker, and as such he wrote the letter to Roberts, and it was through Gardner that the exchange was finally effected.

It follows, therefore, that the court erred in refusing to grant defendant's motion to dismiss the complaint made at the close of the evidence, and for this error the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., BARRETT, RUMSEY and INGRAHAM, J.J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

ADELBERT KULLMAN, Appellant, v. HENRY D. COX, Respondent.

*Specific performance — where a father, a tenant by the curtesy and guardian in socage, acquires real estate left by his deceased wife, by means of a mortgage foreclosure occasioned by his default in payment of interest, his title is marketable.*

A father, who was guardian in socage of his infant children and tenant by the curtesy of premises formerly owned by their deceased mother, subject to a mortgage which was by its terms to become due, at the option of the mortgagee, upon a default of thirty days in the payment of interest, suffered the premises to be sold in foreclosure upon a default in the payment of six months' interest for thirty days, and soon thereafter took a deed of them from the mortgagee, by whom they were purchased at such sale, for the same consideration as that paid at the foreclosure sale, giving in payment a larger mortgage than that foreclosed.

In an action subsequently brought by the father to compel specific performance of a contract made by him for the sale of such premises,

*Held*, that, in the absence of evidence that the father acted in bad faith or with the intent to deprive the infants of their interest in the property, his title to the premises was a marketable one.

O'BRIEN, J., dissented.

APPEAL by the plaintiff, Adelbert Kullman, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 23d day of July, 1897, upon the decision of the court rendered after a trial at the New York Special Term dismissing the complaint upon the merits.

The action was brought for specific performance of a contract for the purchase of real estate.

*Samuel Untermeyer*, for the appellant.

*Francis B. Chedsey*, for the respondent.

McLAUGHLIN, J.:

On the 23d day of April, 1885, Anna Kullman died intestate, leaving a husband, this plaintiff, and their four children, all minors, the oldest born in 1866 and the youngest in 1875. At the time of her death she was the owner of the premises described in the complaint, subject to a purchase-money mortgage given to and held by one Hupfel, to secure the payment of \$3,600 on the 1st day of January, 1889, together with interest thereon which was payable

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semi-annually. The mortgage contained a provision that in case default should be made in the payment of the interest, and such default continued for a period of thirty days, then the principal sum should become due and payable at the option of the mortgagee. The interest due July 1, 1885, was not paid, and it having remained unpaid for more than sixty days Hupfel declared the whole amount due, and instituted an action to foreclose. The action was prosecuted to and resulted in a judgment directing a sale and providing "that either or any of the parties to the action" might become purchasers thereat. Under this judgment the premises were sold in January, 1886, purchased by Hupfel for \$4,000, and he held the same until February following, when he conveyed to the plaintiff for the same consideration, taking back a purchase-money mortgage for \$3,800. The plaintiff has since held the title to, and during all of the time mentioned has resided upon, the premises. In November, 1896, the defendant contracted to purchase, but thereafter refused to perform upon the ground that plaintiff's title was not marketable. This action was then brought to compel defendant to carry out his agreement.

The trial court, upon these facts, which are undisputed, held as a conclusion of law that the foreclosure of the mortgage, by reason of the plaintiff's default in the payment of the interest due thereon, and the conveyance of the property to him while holding the relationship of guardian in socage of his minor children, did not vest in him a title free from reasonable doubt, "nor one that may not be successfully impeached by his children." From the judgment thus entered the plaintiff appealed.

No defect is claimed to exist in the foreclosure proceedings or in plaintiff's record title, and no evidence was given upon the trial, beyond that disclosed by the records, to show that the foreclosure and sale was brought about by the plaintiff to deprive the infants of their interest in the property. There is not a single fact disclosed by the record as it comes to us which indicates that the plaintiff, in all he did, leading up to and in acquiring the title to this property, did not act in good faith. There is absolutely no evidence of a dishonest intent on his part, and there is nothing from which it can be inferred. A title, therefore, which is thus supported by a perfect record is presumed to be a good and valid one, and that pre-

sumption continues until facts extrinsic of the record are established which are so inconsistent with or repugnant to the record that they are permitted to supersede it. A purchaser is of course entitled to a marketable title, and it has been held that the title need not in fact be bad in order to relieve one from his purchase; "but it must either be defective in fact or so clouded by apparent defects, either in the record or by proof outside of the record, that prudent men, knowing the facts, would hesitate to take it." (*Greenblatt v. Hermann*, 144 N. Y. 13; *Fleming v. Burnham*, 100 id. 1; *Moore v. Williams*, 115 id. 586.)

Hupfel had a right to foreclose his mortgage, and, under the judgment, to become a purchaser at the sale. He acquired good title by virtue of the sale, and this he transferred to the plaintiff. The plaintiff, therefore, in the absence of proof that he acted in bad faith, or to the prejudice of his wards, must be deemed to have acquired a marketable title. The most that can be said against his title is that there is a bare possibility that the infants were deprived of their interest in the property by some wrongful act of his or by a conspiracy entered into between him and Hupfel. The defendant, however, has either not been able or has not seen fit to make any proof upon that subject, but instead has left it to mere conjecture or speculation and without a single fact to support such a hypothesis. A mere possibility of this character is not sufficient to raise a reasonable doubt as to the validity of a title good upon the record.

We think the learned trial court erred in dismissing the complaint, and for this error the judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON and INGRAHAM, JJ., concurred; O'BRIEN, J., dissented.

O'BRIEN, J. (dissenting):

I cannot concur in the conclusion reached by the majority of the court. It is conceded that, in order that the plaintiff may succeed in this action, the title which he tendered must be marketable and free from reasonable doubt. It appears that the premises were part of a larger tract of which the plaintiff's wife died seized in 1885, sub-

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ject to the Hupfel mortgage of \$3,000, upon which interest was payable at the rate of six per cent, and the principal of which was not payable until January, 1889. In June, 1885, six months' interest, amounting to \$108, became due, and, remaining unpaid for more than thirty days, the mortgagee declared the principal due because of such non-payment, and brought an action to foreclose the mortgage, laying the venue in the county of Westchester. The property was subsequently sold under foreclosure, and bid in by the mortgagee for \$4,000. The referee's deed was recorded on February 23, 1886, and two minutes later a deed from Hupfel, the mortgagee, to Kullman, the plaintiff, expressing a consideration of \$4,000, was recorded in the same office, together with a mortgage executed by the plaintiff back to Hupfel for \$3,800, payable February 1, 1889, with interest at six per cent. The plaintiff, prior to the death of his wife, had resided with her and her four children, three of whom were minors, upon the mortgaged premises, and maintained there a saloon, buying beer from the mortgagee, who was a brewer.

The plaintiff, as tenant by the curtesy and as guardian in socage of his minor children, while in the possession and enjoyment of the premises, had the duty cast upon him of paying the interest on the mortgage, and thus preventing a foreclosure. In addition, as guardian in socage, he occupied a fiduciary relation towards his minor children, which would prevent him from obtaining, at their expense, any individual benefit. Having failed to discharge the obligation which rested upon him of paying the \$108 interest, and having subsequently obtained the premises, of which the minor children were deprived by reason of his default, there would be a fair ground for contending that the title thus acquired inured to the benefit of such minors. Apart, however, from this, the facts appearing, of which a purchaser examining the record was chargeable with notice, would raise a fair inference that the forms of law which were strictly observed in the foreclosure suit, and which divested the minors of their title in and to the property, were resorted to for that specific purpose; because we find that the \$108, which was a small amount due for interest, was allowed to remain unpaid, and the venue of the foreclosure suit was fixed in Westchester county, while the parties all resided in the city of New York; and that, contrary to the



rules of the court, a sale took place upon the premises, instead of at the Real Estate Exchange, and the purchase was made by the mortgagee, who, prior and subsequent to the foreclosure, was engaged in selling beer to the plaintiff for his saloon; and thus the inference that the suit was a friendly and not a contested action arises.

Although the referee's deed is dated in January, it appears that it was not recorded until just two minutes before Hupfel conveyed the property to the plaintiff. The consideration for that conveyance was \$4,000, the plaintiff giving back a mortgage for \$3,800, and paying in cash at that time more than would have been sufficient to pay the interest when it was due. The effect of the foreclosure, therefore, was not to put the mortgagee in any better position or give him more ample security—it appearing that he increased the amount of the principal by \$200; nor was it of any advantage to the plaintiff, because it did not assist him to pay the interest which was due, but compelled him, in addition, to pay the costs and expenses of the foreclosure suit; but it cut off and divested the title of the minors. I think there is force, therefore, in the argument of the respondent, that all the circumstances attending the transaction appearing on the record raise the presumption that the plaintiff procured the foreclosure for the purpose of cutting off the remainders of his infant children and acquiring the whole title for himself.

It is claimed that the fact that the father held the title, and did not enter into this contract until after the youngest child had become of age, in some way strengthened his position. This contract was made in November, 1896; and it would appear that the youngest child became of age in the same year, and some months prior thereto. But there is no evidence that any of the minors ever had knowledge of the conduct of their father, or that notice was in any way ever brought home to them, it appearing that most of them left him about two years after the death of his wife. Their right, therefore, to repudiate his conduct, or to insist upon their rights in the property, was not terminated, nor would the Statute of Limitations be set running until after notice or knowledge had been brought home to such children.

It is further insisted that it was error not to permit oral evidence to be introduced to remove the doubt which was thus created as to

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the validity of the plaintiff's title. In excluding such, I do not think that the court erred; because, as said in *Fleming v. Burnham* (100 N. Y. 1): "A title open to a reasonable doubt is not a marketable one, and the court cannot make it one by passing upon an objection depending on a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right is vested." And in *Moore v. Williams* (115 N. Y. 592) it is said: "A good title means, not merely a title valid in fact, but a marketable title which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as a security for the loan of money. A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence, or when there is an apparent incumbrance which can be removed or defeated only by such evidence, and so far as there are any exceptions to this rule, they are extraordinary cases in which it is very clear that the purchaser can suffer no harm from the defect or incumbrance. In *Swayne v. Lyon* (67 Penn. St. 436), SHARSWOOD, J., said: 'It has been well and wisely settled that under a contract for the sale of real estate the vendee has the right, not merely to have conveyed to him a good title but an indubitable one. Only such a title is deemed marketable, for, otherwise, the purchaser may be buying a lawsuit which will be a very severe loss to him both of time and money, even if he ultimately succeeds. Hence it has been often held that a title is not marketable when it exposes the party holding it to litigation.'" (See, also, *Greenblatt v. Hermann*, 144 N. Y. 13; *Irving v. Campbell*, 121 id. 353; *Kilpatrick v. Barron*, 125 id. 751.)

The defendant was to pay \$8,500 for this property. But the result of the foreclosure has been to place the plaintiff in undisturbed possession of the property, wherein he was enabled to carry on his business, not even being burdened, except for a short time, with the support of his children. Thus, by the default which he suffered in failing to pay \$108, he has secured to himself, not only a long lease of the premises, but a substantial equity in money, all of which would have inured to the benefit of the minors, towards whom the plaintiff held a fiduciary relation as guardian in socage, if, in the discharge of the obligations imposed upon him by such relationship, he had paid the amount of \$108 interest, which was

much less than the sum that he subsequently paid in order, for his individual benefit, to acquire the property, of which, as the result, apparently, of a friendly action between himself and the mortgagee, he succeeded in depriving his children.

I think that the judgment below was right and should be affirmed.

Judgment reversed, new trial ordered, with costs to the appellant to abide the event.

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In the Matter of the Application of WILLIAM J. HARDY and WILLIAM N. KENNEDY for an Order Directing the KNICKERBOCKER TRUST COMPANY, as Committee of the Property of MARY A. LUCAS, an Incompetent Person, to Pay Certain Claims.

WILLIAM J. HARDY and WILLIAM N. KENNEDY, Appellants; KNICKERBOCKER TRUST COMPANY, Committee of the Property of MARY A. LUCAS, Respondent; JOHN H. WELSH, Committee of the Person of MARY A. LUCAS, Respondent.

*Power of the court to make an adequate allowance to an attorney defending proceedings de lunatico inquirendo.*

Section 2336 of the Code of Civil Procedure, while making general provision for the costs to be awarded an attorney defending a proceeding taken to have a person declared incompetent, does not regulate the compensation for services rendered as between attorney and client.

It is important that an alleged lunatic should be afforded every reasonable opportunity to defend himself in proceedings instituted to have him adjudged to be insane; and if he be ultimately found to be insane the court has the power to award such sum as seems reasonable and right under the circumstances, payable out of his property, to the attorney who has rendered services in defending him.

APPEAL by the petitioners, William J. Hardy and William N. Kennedy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of November, 1897, denying their application for leave to bring an action against the committee of the property of an incompetent person to recover the value of services rendered, expenses incurred, etc.

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*W. J. Hardy*, for the petitioners.

*Charles E. Hotchkiss*, for the committee of the property.

*Charles J. Hardy*, for the committee of the person.

McLAUGHLIN, J. :

On the 26th of June, 1897, Mary A. Lucas was arrested upon a petition made by her son, and committed, under the Insanity Act, to the Long Island Home at Amityville, New York. A few days later a proceeding *de lunatico inquirendo* was instituted and a trial entered upon, which continued until the sixteenth of July following, when the jury, not being able to agree, were discharged and another jury summoned. The second trial was entered upon on the sixth of August following, and on that day Mrs. Lucas made an application to the court for leave, in resisting the proceeding then pending, to use so much of her own property as might be necessary to employ counsel, obtain medical experts, etc. The court did not at once act upon her application; and, before it did so, the second trial terminated and she was found to be incompetent to manage herself or her property by an inquisition which was signed by thirteen of the nineteen jurors. On the twenty-fourth of the following month the court disposed of her application by an order which recited the finding of the jury and directed that she be allowed the sum of fifty dollars, which the committee of her property (as soon as appointed) was directed to pay to her counsel. The petitioners, who had acted as her counsel throughout the proceedings, refused to accept the sum thus allowed, and, instead, made an application for an order either directing the committee of her property to pay to them a certain sum for services rendered and expenses incurred as her attorneys in defending the proceedings to have her adjudged an incompetent person, or that they be permitted to bring an action to establish the same. Their application was denied, and from the order thus made this appeal was taken.

The question of allowance of costs in lunacy proceedings has many times been before the court, but this is the first time, so far as we are able to discover, that the power of the court in this respect has been challenged. The respondent insists that the only

power which the court has is that contained in section 2336 of the Code of Civil Procedure. We do not think this section of the Code is applicable to the case here presented. That section provides a general provision for the costs to be awarded in the proceeding to the attorney for a party adverse to the petition who has appeared in this proceeding. It does not attempt to regulate the compensation to be paid to an attorney for services rendered, as between attorney and client, and there is no reason why one against whom proceedings under the title are instituted should not have the right to the services of counsel, and why such counsel should not be paid for such services when rendered. The most casual consideration of the record cannot fail to impress one that a very serious question was presented as to whether Mrs. Lucas was insane. The first jury could not agree upon that question, and the medical experts did not agree upon either trial. Under such circumstances, she was entitled to the services of counsel, and, for the services thus rendered and expenses incurred by them, acting in perfect good faith, she, or the committee of her property thereafter appointed, became legally and morally obligated to pay. It would be a hard and unreasonable construction of this statute to hold that one alleged to be insane — no matter how much property he may have — can only use, if ultimately found to be insane, the sum of fifty dollars in defending the proceeding instituted to deprive him, not only of his liberty, but of the control of all his property. The section of the Code referred to was not intended to accomplish such result, and it cannot be so construed.

It is important that an alleged lunatic should be afforded every reasonable opportunity to defend himself in the proceeding instituted to have him adjudged insane; and, if ultimately found to be insane, then the court has the power to award such sum as seems reasonable and right under the circumstances, payable out of his property, to the persons who render services in defending him. In this way it is possible to prevent fraud and mistake. This seems to be the view taken in *Carter v. Beckwith* (128 N. Y. 319).

The order made upon Mrs. Lucas' application is in no way binding upon these petitioners; they were not parties to, and had no connection with, that application, except as attorneys for her; they had no standing in court either to appeal from the order or to

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move for a modification of it. It is not, therefore, binding upon them, and does not prevent the enforcement of their claim against the committee of her property.

We think that the order appealed from should be reversed, with ten dollars costs and disbursements, and the application granted permitting the petitioners to bring an action against the committee of the property to enforce their claim.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and application granted.

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JULIUS ROTHSCCHILD, Respondent, v. SAMUEL MOSBACHER and SIGMUND HERZFELDER, Appellants.

*Accord and satisfaction—the use by a creditor of a check of his debtor after protesting that it was too small in amount.*

The delivery by a debtor, and the acceptance and use by the creditor, of a check for a balance of account as it appears by a statement made by the debtor, in reference to which, when objected to by the creditor, the debtor says: "That is what you are going to get; you can take it or leave it; if you want any more you can sue me," the creditor replying: "I will sue you. I accept this thing as a part payment of what you owe me," and, when asked to give the debtor a receipt in full, declining to do so, does not constitute an accord and satisfaction.

APPEAL by the defendants, Samuel Mosbacher and Sigmund Herzfelder, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of April, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of April, 1897, denying the defendants' motion for a new trial made upon the minutes.

Austen G. Fox, for the appellants.

Herman Aaron, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover a sum alleged to be due for commissions on sales made by the plaintiff for the defendants, between 1890 and the close of the year 1893. The plaintiff had a verdict, and from the judgment entered thereon defendants appealed. But one question is presented which calls for a review by this court, and that is, whether the delivery of a certain check to the plaintiff, the receipt and subsequent use of it by him, amounted in law to an accord and satisfaction. The defendants contend that it did, and that, therefore, the trial court erred in denying the motion, made at the close of the evidence, to dismiss the complaint.

The transaction, as detailed by the plaintiff, of the receipt and subsequent use of the check by him, was substantially this: That he went to the defendants' office near the close of the year 1893, and asked them for the balance then due him; that the defendants thereupon directed their bookkeeper to, and he did, make up a statement and hand it to the plaintiff; that he then handed it to one of the defendants, at the same time saying that it did not correctly show his balance. The defendants made no reply, but, instead, again handed him the statement, together with a check for the amount called for by it; that the plaintiff then said, "This is not the balance of my account and you know it;" to which the defendant Mosbacher replied, "That is what you are going to get; you can take it or leave it; if you want any more you can sue me," and the plaintiff replied, "I will sue you. I accept this thing as a part payment of what you owe me." If the jury believed this testimony, then the acceptance and subsequent use of the check by the plaintiff clearly did not amount to an accord and satisfaction, because the check was neither delivered to the plaintiff nor accepted by him with the intent on the part of either of the parties that it should be so considered. On the contrary, the right to bring an action to recover the balance alleged to be due was expressly reserved to the plaintiff. In this connection it is also to be noted that the defendant Mosbacher testified that, when the check was handed to the plaintiff, he asked him for a receipt in full, which he declined to give. To make out the defense here relied upon, says the Court of Appeals, "the proof must be clear and unequivocal that the observance of the condition was insisted upon, and must not admit of the inference that the debtor

intended that his creditor might keep the money tendered in case he did not assent to the condition upon which it was offered." (*Fuller v. Kemp*, 138 N. Y. 231.) The trial court could not say that the proof in this case came up to this requirement. It was a question for the jury to determine whether the check was delivered to the plaintiff upon the condition that its acceptance and use by him was a payment in full, and they have found that it was not, and their finding is sustained by the evidence.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON and O'BRIEN, JJ., concurred.

INGRAHAM, J. (concurring):

I concur in the affirmance of this judgment. The only question presented on the appeal is, whether the plaintiff's claim was extinguished by his retention and collection of a check which had been tendered as payment in full of his unliquidated demand. The appellants claim that, on the respondent's own testimony, a new trial should be ordered, as the verdict of the jury on this question was against the weight of evidence, and because the case was submitted to the jury on an erroneous theory of law. The answer set up an accord and satisfaction. The court submitted to the jury several distinct questions, the one relating to this defense being, "Did plaintiff receive the check offered him in December, 1893, upon the condition that it was to be in full of his account with defendants?" The jury answered "No." Upon this question the court charged the jury as follows: "The sixth question relates to that final transaction which I alluded to in the beginning of my address, the final transaction in which he received the check of \$837.15. The defendants claim that that was a full settlement, and the plaintiff denies it. Now, whether it was a full settlement or not, depends upon what took place between the parties at the time. The plaintiff went there and asked for a statement of his account, and for a payment of what was due to him, and he received a statement showing a balance of \$837.13, and he received a check. The defendants say that they told him that that check was to be in full, and he was to take it or leave it. Now, while he disputed the amount due to him, nevertheless he took it and used it. If there is a dispute



between two parties upon the sum payable from one to the other, and the debtor offers or tenders to his creditor a certain sum, and annexes to it a condition that it is to be received in full and it is taken, then the law says that it is to be deemed a payment in full and an acceptance in full; and that is the case whether you write a letter to your creditor enclosing the check which you offer him in full, or whether you hand to him personally a check, and tell him that if he takes it he must take it in full. In either case, if he accepts it and retains it, then he has no further claim. But if he declines to accept it, and you agree to his retaining it as part payment, then he may maintain an action for whatever he can substantiate as the amount due him."

I think this was a correct statement of the law, and it does not appear that the defendants objected or took any exception to it. To make out an accord and satisfaction it is necessary that there should be a new agreement and the performance thereof. (*Jaffray v. Davis*, 124 N. Y. 164.) "If the claim is unliquidated the acceptance of a part, and an agreement to cancel the entire debt, furnishes a new consideration, which is found in the compromise. A demand is not liquidated even if it appears that something is due, unless it appears how much is due; and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction." (*Nassouy v. Tomlinson*, 148 N. Y. 330.) Here, upon the entire testimony, I think it was a question for the jury to say whether there was a new agreement under which this check was received. If the jury believed the plaintiff's version of what took place when the check was delivered, the question then was whether the condition upon which it was delivered and received was that it was to be received in full for plaintiff's demand, or whether the liability of the defendant for the balance claimed by plaintiff was still an open question which plaintiff would have to have determined by an action at law, if he wished to enforce it. And that was a question of fact as to what the parties did understand as the condition upon which the check was delivered. It cannot be said that upon plaintiff's testimony it appeared that the condition that the check was to be received in full payment was imposed by defendants, and

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so understood by plaintiff, as plaintiff testified that one of the defendants said: "If you want any more you can sue me;" that plaintiff answered, "I will take this as part payment and sue for the balance," to which the defendant replied, "You can do as you please about it; I have got the money and you have got it to get," without demanding back the check which he had delivered to plaintiff or without making an objection to its retention on those terms. An agreement involves what is described as a "meeting of the minds" of the parties to it; and, to establish that, it was necessary that it should appear that the defendants delivered the check to the plaintiff upon condition that an acceptance of it canceled the entire debt; and that plaintiff, understanding that condition, accepted the check, thus acquiescing in the condition imposed by the defendants. Whether or not there was such an agreement in this case was for the jury. If the check was delivered and received with the understanding that the liability of the defendants for the balance claimed was to be subsequently determined by a suit at law or in any other way, and that understanding was the result of what was said when the check was tendered and received, then it is clear that there was no new agreement and no accord and satisfaction; and the jury, having found that the plaintiff did not receive the check upon condition that it was to be in full of his account with defendants, the defense was not sustained.

The appellants conceded on the argument that the verdict of the jury was conclusive as to the amount actually due to the respondent, and, upon the finding of the jury, the plaintiff was clearly entitled to recover.

Judgment affirmed, with costs.

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CALLMAN ROUSE, Appellant, v. LEOPOLD HAAS and Others,  
Respondents.

*Replevin*—an undertaking to reclaim property—it need not be described as being the same property described in the plaintiff's affidavit—what is notice that the defendants will contest the identity of the property.

An undertaking given by the defendants upon a demand for the return of property seized by the sheriff in an action of replevin need not, in order to comply with section 1704 of the Code of Civil Procedure, necessarily recite that the property thus sought to be returned is that mentioned in the affidavit of

the plaintiff; where it does not contain that recital such omission on the part of the defendants constitutes notice to the plaintiff that the defendants propose to litigate, not only the title, but also the identity, of the property taken by the sheriff, as they have a legal right to do.

APPEAL by the plaintiff, Callman Rouse, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of November, 1897, directing the defendants to serve a new undertaking in a replevin suit.

*Louis Manheim*, for the appellant.

*Benno Loewy*, for the respondents.

McLAUGHLIN, J. :

Appeal by plaintiff from an order directing defendants to give a new undertaking upon their demand for the return of certain property seized by the sheriff in an action of replevin.

The error alleged to have been committed is that the undertaking directed to be given does not comply with section 1704 of the Code of Civil Procedure in that it does not contain a recital that the property sought to be returned is the property mentioned and described in the affidavit.

We think a sufficient recital is set out in the undertaking. If the property taken be not in fact the property mentioned and described in the affidavit of the plaintiff, then the defendants were not required to insert a recital to that effect in the undertaking given by them. And to compel them to incorporate such recital therein would simply be requiring them to state what is untrue. The Court of Appeals, in *Martin v. Gilbert* (119 N. Y. 298), distinctly held that, where the identity of the goods is disputed, "then there is neither necessity nor propriety in reciting in the bond that it is such property. Where such recital is made, it is evidence that the defendant intends to litigate only the question of title and not the question of the identity of the goods." The defendants, by giving the undertaking in the form they did, thereby notified the plaintiff that they proposed to litigate not only the title, but the identity of the property as well. They have a legal right to try this question, and should not be prejudiced upon the trial in any manner by a recital in the undertaking.

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The appellant is not in a position to complain of the form of the undertaking in other respects, since it was amended at his request and as he desired. The court had the power to order the amendment. (Code Civ. Proc. § 1705.)

We think the order should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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SAMUEL L. WHITE, Respondent, v. PETER H. McNULTY, Appellant.

*Government contract — agreement to do work upon the articles to be supplied is not an assignment of the contract — objection that the government contractor was not a manufacturer or regular dealer in the articles to be supplied.*

A contract by which one party agrees to do certain work upon articles which the other party thereto has contracted to supply to the United States government does not constitute an assignment of an interest in the government contract within the meaning of section 3737 of the United States Revised Statutes, forbidding such an assignment.

The objection that the government contract was illegal under section 3722 of the United States Revised Statutes, because the contractor was not a manufacturer of or regular dealer in the articles which he contracted to supply, can be taken advantage of only by the government.

APPEAL by the defendant, Peter H. McNulty, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of June, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 27th day of July, 1897, denying the defendant's motion for a new trial made upon the minutes.

M. L. Towns, for the appellant.

A. C. Smith, for the respondent.

VAN BRUNT, P. J.:

This action was brought by the plaintiff, as assignee of one McWilliams, to recover damages alleged to have been sustained by

McWilliams from the failure of the defendant in the performance of a contract alleged to have been made by McWilliams with him. The answer put in issue the existence of the contract and the damages for its non-performance.

It seems to be assumed by the appellant that it was necessary in order that the plaintiff should succeed that he should establish the contract which it was alleged that McWilliams had with the government and the particular terms of that contract. It is further claimed that if any such contract existed it was illegal as being contrary to the provisions of section 3722 of the United States Revised Statutes, McWilliams not being a manufacturer of or regular dealer in the articles which he had offered to supply, and for the supply of which the alleged contract had been made. It was further urged that whatever arrangement might have existed between McWilliams and the defendant in regard to the manufacture of any goods, it was illegal because in violation of section 3737 of the United States Revised Statutes, which prohibited the transfer of any contract or order or interest therein by the party to whom such contract or order was given to any other party.

It is difficult to see how the defendant can avail himself of any prohibition of these statutes. McWilliams made no assignment of any interest in any governmental contract to him. All that he did was to contract with the defendant to do certain work upon articles which he (McWilliams) had contracted to furnish to the government. This was in no manner an assignment of any interest in the contract which McWilliams had with the government. McWilliams was to receive his pay from the government and was to pay the defendant for the work which he was to do.

Neither can the defendant avail himself of the prohibition contained in section 3722. That is a matter resting between the government and the contractor. McWilliams gave testimony tending to establish a contract with the defendant and failure upon the part of the defendant to comply with this contract; and also that he had written numerous letters to the defendant urging completion upon his part and containing criticisms as to the manner in which the work was being performed. Certain letters from McWilliams to the defendant in respect to such performance were offered in evidence which referred to the terms of the contract. Their intro-

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duction was objected to upon the ground that McWilliams could not make evidence for himself as to the terms of the contract. But it appears that they were pertinent to the contract between him and the defendant and to its performance, and that they were written in the usual course of business. It further appears from the evidence that McWilliams had had conversations with the defendant in reference to some of these letters, and that the defendant acknowledged his inability to comply with the contract and told McWilliams to go ahead and see what he could have the contract completed for and let him know. McWilliams testified that he found out what he could get the contract completed for and that he stated the particulars roughly to the defendant, and that the defendant replied, "that is all right, go ahead, that is a relief to me," and that McWilliams thereupon went ahead and had the contract completed.

No motion was made either at the termination of the plaintiff's case or upon the close of the whole evidence to dismiss the complaint upon the ground of insufficiency of proof or for any judgment; and the questions as to the contract, its completion and the damages sustained by the plaintiff, were submitted to the jury without any exception or request upon the part of the defendant, and the jury having found a verdict for the plaintiff, we see no reason to disturb the same.

The exceptions based upon the United States Revised Statutes are evidently unavailing and the exceptions to the receipt of the letters in evidence seem to be equally without foundation for the reasons above stated.

The judgment and order should be affirmed, with costs.

BARRETT, RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Judgment and order affirmed, with costs.

JAMES ELLWOOD SANDERS, Appellant, v. EMILE ADER, Defendant;  
JOSEPH GRIFFING, Respondent.

*Injunction, dependent upon the cause of action — the right thereto must appear in the complaint.*

Where the right to an injunction depends upon the nature of the action (Code Civ. Proc. § 603), the complaint must be presented upon the application therefor, and no facts can be considered except such as are set forth in the complaint.

APPEAL by the plaintiff, James Ellwood Sanders, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 31st day of January, 1898, denying his motion for an injunction *pendente lite*.

*Edward F. Harding*, for the appellant.

*Arnold C. Weil*, for the respondent.

PER CURIAM :

The injunction here is asked for under the authority of section 603, where the right to an injunction depends upon the nature of the action. In that case the facts must appear from the complaint and no facts can be considered except such as are set out in the complaint, and facts alleged in an affidavit are not material and cannot be considered unless they are alleged in the complaint. (*Stull v. Westfall*, 25 Hun, 1.)

Unless a cause of action is set out in the complaint and an injunction is demanded as a part of the relief sought, an injunction cannot be granted. (*McHenry v. Jewett*, 90 N. Y. 58.) The complaint must, therefore, be presented on applying for an injunction, and if he fails to present it the plaintiff does not show that he is entitled to such relief. No complaint was presented here and, therefore, the order denying the injunction was correct and should be affirmed.

Present — VAN BRUNT, P. J., RUMSEY, INGRAHAM and McLAUGHLIN, JJ.

Order affirmed, with ten dollars costs and disbursements.

AUGUSTUS SBARBORO, Appellant, v. THE HEALTH DEPARTMENT OF  
THE CITY OF NEW YORK and Others, Respondents.

*Board of health—suit to restrain its action—an answer, stating simply that its order was made in good faith, is demurrable—it is not made good by § 599 of chap. 410 of 1882—application and constitutionality of that section—pleading.*

Where an action is brought against the health department of the city of New York and the individual members of that board to compel the revocation of certain orders enjoining the plaintiff from using buildings leased by him as a human habitation, without a permit from the health board, condemning the buildings and requiring the plaintiff to remove them, the complaint also asking for an injunction and rental damages, an answer interposed by the individual members of the board of health to so much of the complaint as demands damages against them, which merely alleges that the acts done by the individual defendants were done by them "in good faith, with ordinary discretion, and with evidence before them sufficient to justify their action, and in the due, ordinary and necessary performance of their duties as public officers," and states no facts from which the court can determine the accuracy of that conclusion and presents none of the evidence, alleged to be sufficient, upon which the members acted, is demurrable.

Section 599 of the Consolidation Act (Laws of 1882, chap. 410), which provides that no member of the board of health shall be held to liability for an act done or omitted, in good faith and with ordinary discretion, on behalf of or under the board of health, or pursuant to its regulations, ordinances or the health laws, does not change the rule relating to pleadings which requires a statement of facts showing that the case is within the statute, although the statute itself may not be referred to.

*Quare*, whether section 599 is not limited, in its application, to a single act of destruction or injury which can be redressed in an action at law.

*Quare*, whether it is constitutional.

A defense which is separately pleaded as a distinct defense must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or that part thereof which it purports to answer.

A separate and distinct defense cannot be aided by resorting to other parts of the answer to which it does not refer either in terms or by necessary implication.

APPEAL by the plaintiff, Augustus Sbarboro, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 25th day of January, 1898, upon the decision of the court rendered after a trial at the New York Special Term, overruling the plaintiff's demurrer to the matter contained in the 2d paragraph of the defendants'



answer, on the ground that it is insufficient in law upon the face thereof, and also from an order entered in said clerk's office on the 24th day of January, 1898, directing the entry of said judgment.

This is an action to compel the individual defendants to revoke certain *ex parte* orders made by them as members of the board of health, which perpetually enjoin the plaintiff from using the rear buildings, Nos. 59 and 61 James street, as a human habitation, without a written permit from the board of health, and which condemns the buildings and requires the plaintiff to remove them. The plaintiff also asks an injunction together with rental damages sustained by him during the time he is prevented from using the buildings.

He avers that he is the tenant of these rear buildings, which are tenement houses; that he has sublet the apartments, and that he and his tenants have been forcibly expelled from and kept out of the premises (pursuant to the defendants' orders) to his great and continuous damage.

He also avers that the buildings are and always have been entirely fit for human habitation; have always been sanitary and wholesome, and that their occupants have always enjoyed good health. The defendants, in substance, admit the acts charged, and seek to justify them upon the allegation that the buildings are not fit for human habitation, but, on the contrary, are a nuisance; and that their destruction is essential for the protection of the public health.

The individual defendants then allege, as a separate and partial defense to so much of the action as seeks pecuniary compensation, that their acts were done in good faith, with ordinary discretion. The entire paragraph in question reads as follows:

"II. And as a partial defense to so much of the said complaint and of this action as seeks a judgment for damages against them, the defendants Wilson, Fowler, Doty and Roosevelt allege that as to all of the acts alleged in said complaint to have been committed by them, and as to all the acts admitted in this answer to have been done by them, that the same were done in good faith with ordinary discretion and with evidence before them sufficient to justify their action, and in the due, ordinary and necessary performance of their duty as public officers under and pursuant to the laws in force in the city of New York for the care and preservation of the public health and not otherwise."

To this defense the plaintiff demurred upon the ground that it is insufficient in law. The Special Term overruled the demurrer, and held the plea to be good. From the interlocutory judgment to that effect the plaintiff appeals

*H. A. Forster*, for the appellant.

*Roger Foster*, for the respondents.

BARRETT, J. :

The plea in question must be treated independently. The rule is well settled that a defense which is separately pleaded as a distinct defense must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or that part thereof which it purports to answer. (*The Xenia Branch of the State Bank of Ohio v. Lee*, 2 Bosw. 694; *Ritchie v. Garrison*, 10 Abb. Pr. 246; *Jackson, Recr., v. Van Slyke*, 44 Barb. 116, note.)

This rule does not tend to prolixity. Allegations of fact which form a part of several defenses may be once stated, and be thereafter incorporated in each successive defense by appropriate words of reference instead of repeating them at length in each. (See same cases.) Reference to allegations of fact already stated in previous paragraphs of the answer may possibly import formal words of reference. But that can only be when the intention to embrace and rely upon them is clear and obvious; in other words, by necessary implication. (*Loosey, Recr., v. Orser*, 4 Bosw. 392.)

In the present case we have no such reference, either express or implied. Indeed, there are no allegations of fact in any other part of the answer which could have any bearing upon the special defense attempted to be set up in this plea. It will be observed that the partial defense in terms refers to all the acts alleged in the complaint to have been committed by these individual defendants; that is, to the vacating and removal orders; to the forcible eviction of the plaintiff and his tenants under the vacating order, and to the continuous wrong of ever since keeping the plaintiff out of possession and enjoyment. There is not a single allegation of fact in any part of the answer bearing upon the individual defendants' good faith and ordinary discretion with regard to these acts. There is matter which, if true, entirely justifies their acts and affords a complete defense to the action. There is no allegation, however, which, upon

the assumption that this complete defense may fail, and that the facts alleged in the complaint may ultimately be found, as matter of fact, to have been illegal and unjustifiable, would still protect the individual defendants against the plaintiff's claim for damages. In other words, the other allegations of the answer go to the root of the case, to the inherent legality upon the real facts of the individual defendants' acts, and not to their good faith and ordinary discretion in acting upon the facts which were presented to them when the orders in question were made and when the injuries thereunder were done.

Thus the defense in question must be tested precisely as it reads. It cannot be aided by resorting to other parts of the answer to which it contains no reference in terms or by necessary implication. We have quoted the entire plea in our statement of facts. It is apparent that this plea is bad. The individual defendants therein say that they acted in good faith, with ordinary discretion, but they state no fact from which the court can test the accuracy of the conclusion thus drawn. They also say that their acts were done "with evidence before them sufficient to justify their action," but they do not present the facts which the evidence tended to show. They cannot justify their action by their own unsupported assertion that undisclosed evidence was sufficient to justify what they did. It was held in *Underwood v. Green* (42 N. Y. 142) that an offal contractor acting under an ordinance authorizing the removal of all dead animals and putrid substances is an officer of special and limited jurisdiction, and, although clothed with a judicial discretion, he must, in any given case, where his power is challenged, prove some facts invoking, or tending to invoke, the exercise of his discretion. If he must prove such facts he must certainly aver them. No issue of fact is tendered by an allegation of mere conclusions from undisclosed facts. In *The City of Buffalo v. Holloway* (7 N. Y. 493) it was held that a statement in a complaint that by means of a contract, *which was set forth*, it became the duty of the defendant to perform certain acts, is not sufficient, unless the facts necessary to show the duty are stated.

The authorities in support of the general rule are all one way (*Taylor v. Atlantic Mut. Ins. Co.*, 2 Bosw. 106; *State Bank of Troy v. Bank of the Capitol*, 41 Barb. 343; *Reiners v. Brand-*

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*horst*, 59 How. Pr. 91; *McKyring v. Bull*, 16 N. Y. 297; *Fisher v. Charter Oak Life Ins. Co.*, 67 How. 191; *Talcott v. City of Buffalo*, 125 N. Y. 280), and we need not pursue the subject further than to say that the plea under consideration presents a case of extreme deviation from the rule. The defendants were not bound, and, indeed, could not be permitted, to plead evidence in support of the facts upon which their conclusions rest. But they are clearly bound to plead the issuable facts upon which their discretion was invoked.

It is said, however, that the defendants are protected by section 599 of the Consolidation Act (Laws of 1882, chap. 410). The material parts of this section read as follows:

"No member, officer or agent of said board of health, and no person (but only the board itself) shall be sued or held to liability for any act done or omitted by either person aforesaid (in good faith and with ordinary discretion) on behalf of or under said board, or pursuant to its regulations, ordinances or the health laws. And any person whose property may have been unjustly or illegally destroyed or injured, pursuant to any order, regulation or ordinance, or action of said board of health or its officers, for which no personal liability may exist as aforesaid, may maintain a proper action against said board for the recovery of the proper compensation or damage to be paid by and from the funds of said board of health. Every such suit must be brought within six months after the cause of action arose, and the recovery shall be limited to the damages suffered."

This section is plainly limited to immunity for unjust or illegal acts done in good faith or with ordinary discretion. It does not purport, either expressly or by implication, to enact a new rule of pleading or to prescribe a statutory form of averment. The ordinary rule of pleading, therefore, governs. (*Bayard v. Smith*, 17 Wend. 89.) It was not necessary for the defendants to plead a public statute. "It was," as was said by OAKLEY, Ch. J., in *Goelet v. Cowdrey* (1 Duer, 139) "sufficient for the party to set forth the facts which he is advised bring his case within the statutory provisions, leaving the court to determine whether they apply or not either upon a demurrer or upon the trial. In pleadings under the Code, in which facts alone, as distinguished from conclusions of law, are proper to be stated, it may be doubted whether an express refer-

ence to a statute, of which the court is bound to take notice, might not be struck out as redundant." To the same effect are *Carris v. Ingalls* (12 Wend. 70); *Austin v. Goodrich* (49 N. Y. 268). In the latter case the court said it was a sound and well-settled rule of pleading that the plaintiff who seeks to maintain an action under a statute must state specially every fact requisite to enable the court to judge whether he has a cause of action arising under the statute. The converse is equally true as to a defense arising under a statute. It is quite clear, therefore, that in any view of the case the plea in question, whether treated as under the statute or as general, was bad.

This conclusion renders it unnecessary to consider other important and grave questions which are presented by this demurrer, namely, *first*, whether the section in question was intended to embrace a case like the present where compensation is asked from a court of equity as an incident to its inherent power to restrain the continuous wrongs complained of, or whether the section is not limited to a single act of destruction or injury which can be adequately redressed in a single common-law action for the recovery of the "damages suffered;" and, *second*, whether the act is unconstitutional in depriving a party, whose property is injured or destroyed, of his right to pursue the wrongdoer, and whether the compulsory action against the board, which he is obliged to bring within six months, and in which the recovery is limited to the "damages suffered," can be deemed a certain, adequate and sufficient remedy, especially in view of the fact that the act makes no provision for the raising of the necessary funds wherewith to meet any judgment which the party injured may recover against the board.

The interlocutory judgment should, therefore, be reversed, with costs to the appellant in this court and at Special Term, and the demurrer sustained, with leave to the defendants to withdraw or amend their plea as they may be advised on payment of such costs.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Judgment reversed, with costs in this court and at Special Term, and the demurrer sustained, with leave to defendants to withdraw or amend their plea as they may be advised on payment of such costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JAMES J. WALKER, Relator, v. THEODORE ROOSEVELT and Others, Police Commissioners, Composing the Board of Police Commissioners of the Police Department of the City of New York, Respondents.

*Police board of the city of New York — a conviction reversed as against the weight of evidence — a charge preferred as an afterthought after another charge had been dismissed.*

Where a roundsman of the police force of the city of New York, upon discovering a patrolman, while on duty, drinking from a glass which had been brought to him from a saloon, orders the patrolman to go to the station house, where the roundsman, upon a mere suspicion, prefers a charge of intoxication against him, and, upon learning the next day that the charge of intoxication had fallen through, at once charges the patrolman for the first time with using vile and insulting language to him upon the way to the station house, the testimony of the roundsman in support of the latter charge is open to grave suspicion; and where the only testimony in support of the charge is that of the roundsman, which is refuted by three unimpeached and apparently disinterested witnesses, a conviction of the patrolman upon that charge will be reversed as against the weight of evidence.

RUMSEY and PATTERSON, J.J., dissented.

CERTIORARI issued out of the Supreme Court, and attested on the 24th day of March, 1897, directed to Theodore Roosevelt and others, police commissioners, composing the board of police commissioners of the police department of the city of New York, commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceedings in relation to the dismissal of the relator from the police force of the police department of the city of New York.

*Louis J. Grant*, for the relator.

*Terence Farley*, for the respondents.

BARRETT, J.:

The relator, a patrolman, was dismissed from the force on January 27, 1897, on charges of using insolent and indecent language to Roundsman William A. Bailey, and of loitering on post. The only witness in support of the charges was this roundsman. Bailey testified that on November 6, 1896, the relator lingered on the southwest

corner of Rector street and Trinity place from eleven-thirty-one to eleven-forty-five P. M., in conversation with two citizens; that just before the expiration of this period a glass was brought him from a saloon near by, from which he drank, and that thereupon he moved on. Upon this, to use the roundsman's own words, "I called him back and asked him if that was the way he was doing his duty, loitering there 14 minutes in conversation with two citizens, and having a drink brought out to him. He looks at me, and he says: 'You accuse me of drinking rum?' I says, 'No; I don't accuse you of drinking rum; you look as if you have been drinking; I tell you now that I think you are drunk, and I order you to report to the station house forthwith.'" On the way to the station house, he now says, the relator used the vile and insulting language set forth in the specifications. At the station house, however, his charge was of intoxication, and thereupon the sergeant made the relator walk the floor. The relator then walked perfectly straight, as the roundsman admits; and the surgeon, who came later, pronounced him sober. The roundsman did not learn this latter fact until the next day, when he at once made the present charges.

Certainly this testimony has unsatisfactory features. The circumstances attending the first charge are such that controlling weight ought not to be given to the roundsman's subsequent statements, when such statements are unsupported, and are denied by several unimpeached witnesses. To charge a police officer with intoxication, while upon duty, is a sufficiently serious matter. Yet the roundsman made this charge; and he made it without the slightest foundation or justification. He takes pains to state that he based it upon his own observation of the relator's condition. He accused him thus: "You look as if you have been drinking; I tell you now that I think you are drunk." And he follows this up by stating that, on the way to the station house, the relator "was able to stand and able to walk, but not steady." Yet the station house was only two blocks and a half away, and there the relator walked straight enough to satisfy the critical eye of the sergeant; "perfectly straight," as the roundsman himself admits.

It is quite clear that Bailey jumped at the conclusion that the relator had been drinking intoxicating liquor, from the fact that something in a glass was brought out to him. This fact was,

undoubtedly, the key to the roundsman's conduct throughout. He is careful to deny that he charged the relator with drinking rum; but the latter and the two persons with whom he was conversing assert the contrary; and all the probabilities favor their testimony. In fact, the truth is easily gathered from the roundsman's own testimony. He says that he asked the relator what he meant by "having a drink brought out to him." Surely he did not mean a drink of water. And, if he did not make the charge of drinking rum, why should the relator have appealed to the men with him, as the roundsman admits he did? We thus have the roundsman making this serious charge upon mere suspicion, for he is forced to admit that he could not see the contents of the glass; and then, when he saw its futility, denying that he ever made it. His manner of treating the charge is equally noteworthy. He admits that the relator appealed to those who were with him, and asked that the matter be looked into at once; and that he refused. He testified: "Didn't he (the relator) ask you to make an investigation then and there as to what he had? A. He did. Q. Did you do it? A. No, sir." Instead of making the desired investigation, he prepared to follow the dictates of his own suspicions, and, relying upon them alone—in the face of evidence that they were unfounded—to drag the relator off to the station house, and make a charge against him which would be a blot upon his record.

As to the alleged offenses for which the relator has been dismissed, this hasty roundsman deemed them of so little importance that he never even mentioned them until his first charge had fallen through. It is impossible, under such circumstances, not to look upon the roundsman's testimony, in support of these subsidiary charges, with grave suspicion. These charges certainly look like an afterthought. His testimony in support of them has no inherent weight, and it cannot bring conviction, as against the opposing testimony of three unimpeached witnesses, completely negating the accusation of loitering and of using indecent language. These three witnesses testify that all the way to the station house they were within hearing distance of what passed between the roundsman and the relator, and they fully corroborate the latter's denial of the use of any bad language. There is complete unanimity in their statements, with-



out any such concurrence in *minutiae* as would lead to the inference that they had been coached. Two of them were casual acquaintances of the relator, not friends, as claimed, and their testimony is in nowise impeached. Their presence upon the occasion in question is not doubted, and it could not well have been prearranged.

The other witness (Mulvey) was an absolute stranger to the relator. He, too, went to the station house, and was near enough to hear all that passed. And he also states positively that the relator did not use any of the language ascribed to him. The roundsman says that he did not see Mulvey, but does not attempt to deny that he was present. This witness, in appearing and testifying as he did, could have been actuated only by a sense of duty; either that, or his testimony was wholly fabricated—an assumption which is entirely gratuitous.

Unless these trials are to be treated as mere idle formalities, we are unable to see how the present proceedings can stand. It would be impossible to uphold the verdict of a jury upon the unsupported testimony of a witness whose credibility is thus shaken and who is combated by the credible testimony of three unimpeached and apparently disinterested witnesses. If ever we are to exercise the function conferred upon us by the statute, of reversing a conviction as against the weight and preponderance of evidence, we think it should be done in this case.

The proceedings must be annulled and the relator reinstated, with costs.

VAN BRUNT, P. J., and O'BRIEN, J., concurred; RUMSEY and PATTERSON, JJ., dissented.

RUMSEY, J. (dissenting):

Whenever a motion is made to set aside a verdict upon the ground that it is against the evidence it is incumbent upon the moving party to satisfy the court that the evidence so preponderates against the verdict that the court can see that it was the result of passion, prejudice, partiality or corruption. The same rule is applied in cases like the present, where an effort is made to reverse the findings of the commissioners solely upon the ground that they are not sustained by the evidence. (*People ex rel. Lang v. Martin*, 5 App. Div. 217; *People ex rel. Strauss v. Roosevelt*, 2 id. 536.)

The sole question here is one of fact. In considering it, it must not be forgotten that the commissioners who decided it, while they did not have an opportunity to see the witnesses, did have personal acquaintance with the two members of the police force, whose evidence was contradictory, and were aware how much weight ought to be given to each of them, and that one of the commissioners had the benefit of seeing the witness and hearing him testify. The charge against the relator was of conduct unbecoming an officer, and the specification was that, on the 6th of November, 1896, he being a patrolman and on patrol, used insolent and indecent language to Roundsman Bailey, who was his superior officer. The language it is not necessary to repeat; but if such language was used, it was, undoubtedly, a sufficient reason for the dismissal of the relator. The question, then, is whether, upon all the evidence, we must say that the commissioners made a mistake in concluding that the language was used.

The undisputed facts are that, on the night in question, the relator was on patrol. The roundsman, Bailey, while making his rounds, discovered the relator in conversation with two citizens in front of a saloon. Just how long he was there is in dispute. The roundsman says that it was from eleven-thirty-one to eleven-forty-five. The defendant and his witnesses make the time somewhat shorter, but no one of them is able to specify precisely how long it was. It is conceded, however, that he was there. After the roundsman had seen him at this point "loitering," as he calls it, one of the men with whom he was talking went into the saloon and brought out something in a glass, which he gave to the patrolman, who drank it and started off. The roundsman thereupon started toward the relator, and the relator walked away. He was called back by the roundsman, who accused him of loitering there fourteen minutes in conversation with two citizens, and having a drink brought out to him. The patrolman stated that he drank nothing but water or seltzer, and that he was talking with the citizens about two suspicious characters to whom they had called his attention. There was some considerable conversation in regard to the drinking, whereupon the roundsman accused the patrolman of being drunk, and ordered him to the station house. On the way to the station house there was some conversation between them, in the course of which the roundsman insists

that the words complained of were used. This, however, is denied by the relator, and the question is whether the commissioners erred in believing the roundsman. He testified that on the way to the station house the patrolman was excited and angry, and expostulated against being put under arrest, and, so far as the fact that he expostulated, and that he resented his arrest and complained of it as unjust, the roundsman is clearly corroborated by all the witnesses. He testifies that on the way to the station house and in the course of his complaints he used the words complained of. This is denied by the patrolman, who says that he had a conversation with the roundsman while they stood at the corner, but he does not pretend to give one word that was said between them from the time they started to the station house until they arrived there, and there is nothing in his testimony from which it could be inferred that anything was said between them. Although he does not deny having conversation on the road to the station house, he carefully refrained from giving one word of it or telling anything about it. This was the state of the evidence as between the two parties most interested in the transaction. It is claimed by the patrolman that he is corroborated by the testimony of three witnesses who followed him to the station house, two of whom were present at the time he was put under arrest. These three witnesses testify substantially that the conversation at the corner was that the roundsman accused the relator of being drunk; that the patrolman denied it, and stated that he drank nothing but seltzer, which was brought to him by one of the witnesses, who corroborates him in that regard, but that nevertheless the roundsman accused him of being drunk and ordered him to go to the station house, which he and the roundsman proceeded to do. The witnesses testified that they followed behind. They say that they were close enough to hear all that was said by the patrolman to the effect that he was sober and ought not to have been arrested, but they do not pretend to testify explicitly and directly to all that was said. They simply speak of the subjects upon which the patrolman was talking to the roundsman. It is evident that, so far as the fact of the conversation is concerned, their testimony corroborates the roundsman, and does not corroborate the relator, who says nothing about having any conversation on the way to the station house. The weight to be given to their testimony, and whether it should

be accepted as contradicting that of Bailey, depends on the question whether or not they heard all that was said. They testified that they were near enough to do so, and Flock says that he was within hearing the whole time and he testifies that no such language was used as that stated by the roundsman. Mulcahy, the other witness who was present talking with the two men and who followed them to the station house, said that he was near enough to hear, but that he heard nothing of the sort and that the relator did not use any such language. The other witness, Mulvey, testifies to substantially the same thing. That testimony is entirely negative in its nature. It is quite evident that there was conversation between these two men on the way to the station house. It is equally evident that each man was somewhat excited and that the relator particularly strongly resented his arrest and the charge of drunkenness made against him. It is quite clear, too, that he found fault with the roundsman for arresting him. So much is necessarily to be inferred from the testimony of these witnesses who are said to be disinterested. But it is remarkable that while they concede so much they are utterly unable to give more than the idea which was conveyed, and they say nothing about the substance of the words in which it was conveyed. In fact, only one of them attempts to state any words at all. It is impossible to regard that testimony as corroborating fully the story of the patrolman unless one is prepared to accuse the roundsman of rank perjury. But no foundation is laid for anything of that kind. It is said that it is undoubtedly true that, on arriving at the station house, he preferred a charge of drunkenness against the relator and that he had accused him of drinking rum in front of the saloon. This last charge was a very natural one and one which, under the circumstances, he was justified in making. When a policeman is seen in front of a saloon and a drink is brought out to him which he tosses off, any one seeing it has a right to infer that he is drinking something besides water. Whether he shall believe the policeman when he says that he drinks nothing else, is a matter which must be determined by the character of the man who makes the statement and all the surrounding circumstances. The roundsman was perfectly justified in believing that the drink which was taken was something else than water; and, acting upon that belief, he was perfectly justified in saying to the patrolman what he did say when he

first accosted him. It is clear, however, that the patrolman was not intoxicated, and so far as the making of that charge was concerned it was a mistake at least. It was claimed by the relator that the roundsman having made that charge against him was incensed at his failure to substantiate it, and for that reason made the subsequent charge for which the relator was dismissed. But there is nothing to establish that except the fact that one charge was made after the other. The charge of drunkenness is a more serious one than that of using abusive language, and it might well have been thought by the roundsman that, having made one charge, there was no necessity of making the other. The fact that he did not make both charges at once is fairly to be considered in weighing his testimony, but it is not, to my mind, a matter of any great moment, and certainly it is not to be inferred from anything that is made to appear in this case that, in making either charge, he was actuated by any ill-feeling towards the patrolman or by any desire to do anything more than his duty. If the case were one tried before a jury it is quite clear that the court would have been compelled to submit the truth of the charge to their determination; and, having in view all the corroborating circumstances, I do not think the court would be justified in setting aside a verdict based upon a belief in the truth of the testimony of the roundsman. For these reasons, and applying the rule, well settled in these cases, I cannot say that the conclusion reached by the commissioners was wrong, and, therefore, their action should be affirmed, and the writ dismissed.

PATTERSON, J., concurred.

Proceedings annulled and relator reinstated, with costs.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Plaintiff, v. AMELIA GORMAN, as Executrix, etc., of JOHN J. GORMAN, Deceased, and Others, Defendants.

*Sheriff of New York—liability of his executrix and sureties for fees not paid over under chapter 523 of 1890—constitutionality of that act—estoppel to deny its validity—form of a bond under this statute—the city may sue upon it—plea of plene administravit—right of a claimant to put his claim in judgment.*

Chapter 523 of the Laws of 1890, entitled "An act in relation to the office of sheriff of the city and county of New York," providing for the compensation, by salaries and fees, of the sheriff and of his subordinates, fairly embraces within its subject and title all matters legitimately and naturally connected with the administration of that office in its entirety, and the powers, duties and emoluments of its administrators, and, hence, is not a violation of section 16 of article 3 of the then existing Constitution of 1846, as being a local bill embracing more than one subject, or embracing subjects not expressed in its title; nor does it, in providing for the compensation of the sheriff and his subordinates, appropriate, in the sense of the Constitution, "the public moneys or property for local or private purposes;" nor does it create a tax.

The executrix of a sheriff who went into office, received his statutory salary, paid over a part of the fees received by him to the comptroller of the city of New York, and received back one-half of such fees, under chapter 523 of the Laws of 1890, is estopped from claiming, in defense of an action brought by the mayor, aldermen and commonalty of the city of New York to recover a balance of moneys still due the city from him under that act, that it is unconstitutional; nor can she interpose a counterclaim for all the moneys which her testator had thus paid to the city.

In this respect the sheriff, the sureties upon his official bond and the legal representatives of each of them are similarly situated.

An official bond given by a sheriff, who took office on the day when the act (Chap. 523 of the Laws of 1890) went into effect, was considered to have been properly drawn under that act and not under the statutes as they existed before its passage; and although in form running to the People of the county of New York, it was held that it might, without any leave being first obtained to sue thereon, be, in a proper case, sued upon by the mayor, aldermen and commonalty of the city of New York to recover fees which the sheriff had failed to pay over.

In such an action it is not a defense to the executors of a surety that, although they duly advertised for claims against their testator, the claim in question was not presented "within six months" after the first publication of the notice authorized by section 2718 of the Code of Civil Procedure, and that they have paid out all the assets of the estate which have come into their hands; the statute merely relieves them from any liability for assets which they, after the

time for publication had expired, have legally distributed; it does not prevent a claimant against the estate from liquidating his claim by putting the same in judgment.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

The plaintiff seeks a judgment against the executrix of former Sheriff Gorman and the sureties upon the latter's official bond, for the sum of \$5,388.88, being moneys received by Mr. Gorman, as sheriff, which he did not account for or pay into the treasury of the city. Two of the sureties, Messrs. McQuade and Plunkett, are alive and are sued individually. The other surety, Erastus Crawford, is dead and his executors are sued as such.

Several defenses are interposed to the claim, the principal one being that the act of 1890 (Chap. 523), under which the liability was created, is unconstitutional. This defense is set up by the executrix of Mr. Gorman and also by the legal representatives of the surety Crawford. As a sequence to this defense, the executrix of Gorman sets up a counterclaim against the city for the sum of \$160,684.43, being the city's share of the moneys paid over to it by Gorman during his term of office. She also asks, in case the court shall hold the act of 1890 to be constitutional, that the sum to which the sheriff would still be entitled, had he paid over the entire gross sum received by him, be deducted from the amount claimed herein by the plaintiff, and judgment be rendered against her only for the balance. The sureties, McQuade and Plunkett, defend upon several grounds, the principal one being that the obligee named in the bond should have been The People of the State — according to the law prior to the act of 1890 — and not The People of the City and County of New York — as provided in that act. They also make the further defense that, even if the proper obligee is named in the bond, the action cannot be maintained by the mayor, aldermen and commonalty of the city of New York.

The representatives of the surety Crawford claim, further, that they are not liable, because, having duly advertised for claims against their decedent more than six months prior to the commencement of this action, the plaintiff failed to present its claim to them within this statutory period. They aver that, since then, they have fully administered all the "goods, chattels and property which were of"

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their testator at the time of his death, and that when this action was commenced they had no assets or money of the deceased, having paid out all such assets and money in satisfaction of lawful claims and legacies. Other minor points were made, but they were either withdrawn upon the argument — *e. g.*, the point that the bond only ran for one year — or else they were subsidiary to the claims already specified. They need not be here specifically referred to.

*Chase Mellen*, for the plaintiff.

*A. C. Shenstone*, for the executrix of Gorman.

*John G. H. Meyers*, for the sureties Plunkett and McQuade.

*Jacob Fromme*, for the executor of the surety Crawford.

BARRETT, J. :

The questions here presented are more numerous than important. The main question, namely, the constitutionality of the act of 1890 may be briefly disposed of. The claim made by the defendants is that this act violated section 16 of article 3 of the then existing Constitution, in that it was a local bill and embraced more than one subject, and that the subjects embraced in it are not expressed in its title. This claim is without merit. There is but one subject embraced in this act and that subject is plainly expressed in its title.

The subject is the office of sheriff of the city and county of New York, and the title is, "An act in relation to the office of sheriff of the city and county of New York." What might reasonably be expected of an act relating to such an office? Clearly, provisions regulating its administration, and the powers, duties and emoluments of its administrators. One would hardly look exclusively for mere matters of detail in an act thus entitled. It is the office in its entirety which is referred to; and all matters legitimately and naturally within the official scope may fairly be said to be embraced within both subject and title. The act in question is within the principle stated in such cases as *The People v. Briggs* (50 N. Y. 553); *Sweet v. City of Syracuse* (129 id. 316); *People v. Backus* (11 App. Div. 147; *affd.* in Court of Appeals, 153 N. Y. 686), and *Astor v. Arcade Ry. Co.* (113 id. 93).

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What was here contemplated was a new system of management and administration in the sheriff's office of this county. Fixed salaries were given to the sheriff and his deputies instead of fees. Minute provisions were made for the effective working of the new system. The act was passed in June, 1890, and was to take effect upon the first day of the following January, the intention being not to interfere with the then present sheriff, whose term of office was about to expire, but to apply the new system to the sheriff who should be elected in the *interim*. Mr. Gorman was so elected sheriff in November, 1890, and he accordingly took office, under the act, upon the 1st day of January, 1891. He served out his statutory term, and administered the office throughout under this act. He received his salary from time to time throughout his term, and paid over to the comptroller for the city upwards of \$200,000 of the fees of the office. He also received from the comptroller one-half of the fees which he so paid over. He died in May, 1895. And now his executrix makes the extraordinary claim that the act under which her decedent administered his office, received his statutory salary, paid over the fees to the comptroller and received back one-half of them, was unconstitutional; and that as a legal consequence she not only can retain the fees which were not turned into the city treasury, but can actually recover back from the city all those that were.

Even if the act were invalid, neither the officer, nor his sureties, nor his or their representatives, would, under such circumstances, be permitted to plead its invalidity. Having received the moneys in question under the act, the officer would be estopped from claiming its unconstitutionality in order that he might retain them. He certainly could not enjoy the benefits of the act and plead invalidity as to the duties. There is no case directly in point, doubtless because no public officer has ever ventured to make such a claim. But the rule laid down in *Supervisors v. Allen* (99 N. Y. 532) points with sufficient emphasis to the governing principle. There it was said that a defendant, who had received funds by virtue of an act which directed that they should be allowed to him for the benefit of his county, could not set up the invalidity of the act under which he received the money and on that ground claim to retain it for himself as against the party for whose benefit he

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received it. This, as Judge RAPALLO said, is "fundamental." (See, also, *People v. Murray*, 5 Hill, 468; *People v. Mead*, 36 N. Y. 224; *First Nat. Bank v. Wheeler*, 72 id. 201; *Ross v. Curtiss*, 31 id. 606; *Buck v. City of Eureka*, 30 L. R. A. 409.)

The sureties Plunkett and McQuade do not take this constitutional objection. The executors of Crawford do; but they stand in this regard in the shoes of their principal. If he cannot question the act, they cannot. If he is liable, they are.

This latter consideration renders it unnecessary to consider the other points made against the constitutionality of the act. Indeed, it was not necessary, for the same reason, to consider even the point which has been discussed. We may say, however, that there is nothing in these subsidiary attacks upon the act.

Some of them are answered by the statement of facts in the agreed case, others by the settled rules of law. For example, the act appropriates no money for local purposes in the constitutional sense. The Constitution was directed to the appropriation for local purposes of *public moneys*, that is, moneys of the State. (*Supervisors v. Allen*, *supra*.) But there was here no appropriation of any moneys, State or local. There was simply a provision for the compensation of the sheriff and his subordinates, with appropriate machinery to provide the means.

Nor does the act create a tax. Article 3, section 20, of the Constitution (prior to 1894) applied only to a general tax. (*Jones v. Chamberlain*, 109 N. Y. 100; *Matter of McPherson*, 104 id. 319.) But this act, as was said of the act under consideration in *Darlington v. The Mayor* (31 N. Y. 186), "does not impose a tax of any kind, either State or municipal. Its provisions may, and no doubt will, lead to the necessity of local taxation; and the same thing may be said of every act of legislation under which an expenditure for general or local purposes may in any contingency be required."

It is also contended that the bond should have been in the form required by the law which was in force prior to the passage of the act of 1890. That, however, was not contemplated by the act in question. The plain intention of the act of 1890 was that the sheriff elected in the fall of that year should give the bond provided for in that act. That bond related, and was specially adapted, to the new system. It was required to be given before any sheriff,

succeeding the sheriff then in office, should enter upon the duties of his office. (§ 7.) But the defendants argue that this very section (7) did not take effect until the 1st day of January, 1891, for the reason that it is not embraced in the exceptions specified in section 24. This latter section reads as follows: "This act shall take effect on the first day of January, eighteen hundred and ninety-one, *except sections twenty-one and twenty-two thereof*, which shall take effect immediately."

When we look through the act, however, we find that other sections as well as sections 21 and 22 are excepted, not in express terms, but by necessary implication, *e. g.*, section 11, which requires the then-present sheriff, "*at least thirty days prior to November 1, 1890*," to send to the board of estimate and apportionment an estimate in writing of the amount of expenditures required in the office of sheriff for the ensuing year (1891). Thus the 11th section was clearly excepted. And so necessarily was the 7th section, providing for the bond to be given before the succeeding sheriff should enter upon the duties of his office on the 1st day of January, 1891. It is quite clear that what was meant by the phrase (in § 24), "This act shall take effect," etc., was *that the new system in its essential features* should take effect on the 1st day of January, 1891. It was not intended to postpone until that date all the details essential to the proper inauguration of the system. At all events, the bond was given before Mr. Gorman entered upon the performance of his duties, and that was sufficient to give it validity as his official bond.

The point is also taken that, as the bond ran to *the People* of the county of New York, an action thereon cannot be maintained by the corporate body. There is nothing in this point. The mayor, aldermen and commonalty of the city of New York was the legal entity which represented the People of the county. As such, the bond in legal effect ran to it. It is certainly the real, as it is doubtless the only, party in interest. The government of both city and county was vested in the corporate body, and the act itself (§ 18) declares that the fees received by the sheriff thereunder *belong to and are for the benefit of the city and county*, and that for failure to pay over such fees to the comptroller, the sheriff shall be liable *to the said city and county* in a civil action. Thus, the act itself treats "the People of the county of New York" and "the city and

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county of New York" as synonymous. We think it is entirely clear that the People of the county are required to be named in the bond as obligee simply because they are the ultimate beneficiaries, and that the real obligee is the concrete legal body which governmentally represents the general constituency. There was, therefore, no necessity for the plaintiff to obtain leave to sue upon the bond. It was not the assignee of the bond or the successor of the obligee, but rather the obligee itself, both in law and in fact.

The remaining question is as to the liability of the executors of the surety Crawford.

The Code of Civil Procedure (§ 2718) provides that, if "a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication" of the statutory notice (previously provided for), the executor or administrator "shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced." The executors of the surety Crawford here show that they have paid out all the assets and moneys which came to them from the decedent in satisfaction of lawful claims and legacies, and in making the distribution authorized by the statute. Their contention is that thus they have become exempt from liability in this case. We think they misapprehend the meaning of the section. When it says that *they shall not be chargeable for* any such assets or moneys thus distributed, it means that they shall not be so chargeable as executors, nor required to account to the plaintiff therefor. It does not mean that the debt against the estate shall not be liquidated by a formal judgment. The only Statute of Limitations as against such original debt or obligation is that provided for in *section 1822 of the Code*. That section provides in substance that where an executor or administrator disputes or rejects a claim *which is presented to him*, the claimant must commence an action for the recovery thereof within six months after the dispute or rejection, or, if no part of the debt is then due, within six months after a part thereof becomes due.

The old common-law pleas of *plene administravit* and *plene administravit praeter* were substantially abolished by the Revised Statutes. Section 2718 of the present Code was taken in part

from the Revised Statutes. (2 R. S. 89, § 39.) This latter section, however, provided that in an action brought upon a claim which should not have been presented to the executor or administrator the latter might prove the statutory notice as to publication for claims and subsequent distribution "*in support of his plea of having administered the estate of the deceased.*" The section which immediately followed (§ 40) also provided that in such an action the plaintiff should "be entitled to recover only to the amount of such assets as shall have been in the hands of such executor or administrator at the time of the commencement of the suit, or he may take judgment for the amount of his claim, or any part thereof, to be levied and collected of assets which shall thereafter come into the hands of such executor or administrator." Even under these sections of the Revised Statutes it was held that the plea of *plene administravit* was no longer a good plea or a bar to a recovery. (*Parker's Exrs. v. Gainer's Admr.*, 17 Wend. 559; *Allen v. Bishop's Exrs.*, 25 id. 414.) Chief Justice NELSON, in the latter case, referring to these sections of the Revised Statutes, made the following pertinent observations: "There are some sections in the Revised Statutes which it is impossible to reconcile with the general system prescribed in respect to the settlement of estates of deceased persons. The system itself does not seem to have been fully comprehended by its authors. A *pro rata* distribution among the creditors of a class, in case of deficit in the assets, is a fundamental principle, for the enforcement of which abundant provision has been made. The whole fund is brought under the control of the surrogate, and not a dollar can be touched without his assent. Executors and administrators are but trustees to settle the estate under his direction and control, agreeably to the principles of the statute. Nothing is gained by obtaining a judgment against them beyond the liquidation of the debt. The creditor gets no costs, except at the discretion of the court, and only his *pro rata* share on the judgment. The result is the same whether the suit be defended or not. (18 Wend. 666; 12 id. 542; 17 id. 559.) The plea of *plene administravit*, therefore, seems altogether inappropriate and useless. It has already been held in the case last above cited that the plea of *plene administravit praeter* is no longer a bar, notwithstanding section 31, 2 R. S. 29, which imports the contrary; and I think we are

bound to say the one in question is not a bar, *though the 39th section seems to indicate otherwise.*"

It was clearly in view of this incongruous condition of the law, even under the Revised Statutes, and to harmonize and perfect the new system, that the useless and futile pleas suggested in these sections 39 and 40 of the Revised Statutes were omitted in the Code. And their omission must be considered not only in the light of this preceding legislation and the judicial criticism thereupon, but also in the light of other sections of the Code itself. Thus, in section 1822, a Statute of Limitations against the original debt or obligation of the decedent is provided for; in section 1824 an express provision is to be found that in such an action the existence, sufficiency or want of assets shall not be pleaded by either party, and in section 1825 that no execution shall be issued upon a judgment against an executor or administrator, in his representative capacity, until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued. In addition, sections 1835 and 1836 deprive a plaintiff who fails to present his claim, not of his judgment for the debt, but simply of costs. And further judgment in such an action is not evidence of assets in the defendant's hands. It is apparent, therefore, that the purpose and effect of the provision of section 2718, under consideration, are, while permitting the claimant to liquidate his debt against the estate without costs, to limit him to such liquidation, so that the formal judgment shall not be chargeable upon any assets or moneys which the executors or administrators have lawfully paid out after the expiration of the statutory period of six months. Thus, neither the executors here, nor the estate which they represent, will be prejudiced by this liquidation of the debt; while the plaintiff, though it cannot charge the judgment upon the assets which have been administered, may proceed, under the statute, to obtain satisfaction of the judgment from the recipients of those assets.

We think, therefore, that the plaintiff is entitled to judgment against all the defendants for the amount of its claim, with costs, except as to the executors of Crawford, to be collected as against the individual defendants by execution, etc., in the usual manner, and as against the executrix of Gorman and the executors of Crawford as provided by law. We will hear the parties, upon the settle-

ment of the judgment, as to whether the sum which Sheriff Gorman would have been entitled to had he, during his lifetime, paid over the amount in controversy to the comptroller, shall be deducted from the amount of the claim as now liquidated. The plaintiff may be willing to avoid circuity of action and to take judgment for the proper balance. We see no objection to this course if the plaintiff consents to it. The plaintiff is entitled to costs against all the defendants except the executors of Crawford.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Judgment ordered for plaintiff as directed in opinion, with costs.

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PETER H. DALY, Appellant, v. THE CENTRAL RAILROAD COMPANY  
of New Jersey, Respondent.

*Negligence—what is a reasonable opportunity to leave a train is a question for the jury.*

In an action brought by a passenger on one of the defendant's trains, who, waking up at a terminal station after the other passengers had left the car and had proceeded some 80 or 100 feet from it, attempted to alight while the train was standing still, and was thrown down and injured in consequence of the train being suddenly backed, the question whether the defendant was, under the circumstances, negligent in too precipitately backing the train, should be submitted to the jury.

APPEAL by the plaintiff, Peter H. Daly, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 28th day of June, 1897, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 22d day of September, 1897, denying the plaintiff's motion for a new trial made upon the minutes.

The plaintiff was a passenger upon one of the defendant's trains which arrived in Jersey City on the evening of the 23d of June, 1895. He was asleep when the train came to a final stop. Waking up then he found that the other passengers had left the car, whereupon he at once proceeded to alight. The car was then at a

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standstill. At the moment he attempted to step off, the train was suddenly backed with what he called a "jump and jounce" and he was thrown off and injured.

*Gilbert D. Lamb*, for the appellant.

*George Holmes*, for the respondent.

BARRETT, J. :

The learned trial justice dismissed the complaint on the ground that the plaintiff was given a reasonable opportunity to alight. He so ruled as matter of law. We think this was error. Whether the time here given was reasonable was, under the circumstances, a question of fact for the jury.

The station in question was terminal. There was consequently no necessity for dispatch as in the case of temporary stoppage at a way station. At the terminus a passenger may reasonably act upon the assumption that as the transit is ended the train will probably remain where it is at least for some brief period. Then, too, the car here was so crowded that many persons had to stand in the aisle. It also appeared that the other passengers had not proceeded more than 80 or 100 feet from the exit of the car before the train was suddenly backed. The jury might properly have found that the defendant's employees thus acted precipitately. These employees should have considered the situation as it was. They knew, or should have known, that such closely-packed cars could not be vacated in a moment. Upon the evidence the jury might have found that but a few seconds elapsed from the time when the car stopped until it was started back, and that the act of the defendant's employees in starting it back when and as they did was precipitate and negligent.

There was no question of contributory negligence. The train was at a standstill when the plaintiff attempted to alight, and there was absolutely nothing in the surroundings from which any sudden movement, either backward or forward, could reasonably have been anticipated.

Our conclusion is that the question of the defendant's negligence in backing the train at the time, in the manner and under the cir-



cumstances disclosed, was one of fact, which should have been submitted to the jury.

The judgment and order appealed from should, therefore, be reversed, and a new trial granted, with costs to appellant to abide event.

RUMSEY, PATTERSON and O'BRIEN, JJ., concurred ; VAN BRUNT, P. J., dissented.

Judgment and order reversed, new trial granted, costs to appellant to abide event.

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FRANKLIN BIEN. Respondent, v. MAX FREUND and BERNHARD FREUND, Appellants.

*Attachment — contract liability on the undertaking — counterclaim against the defendant in the attachment suit enforced against an assignee of the undertaking — it must exist before notice of an assignment of the undertaking.*

An undertaking, given upon the issuing of a warrant of attachment, creates a contract liability, and in an action brought upon such undertaking a counterclaim arising upon contract may be interposed by the sureties signing it.

In an action brought upon the undertaking by an assignee thereof, the sureties are entitled, under section 502 of the Code of Civil Procedure, to interpose against such assignee, as a counterclaim, a demand against the defendant in the attachment suit, which they purchased before receiving notice of the assignment of the undertaking.

A person who is liable upon a contract obligation, which has been assigned to a third party, may protect himself against such obligation in the hands of the assignee by the purchase of a cause of action against the original creditor at any time before notice of the assignment.

APPEAL by the defendants, Max Freund and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 8th day of October, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 12th day of October, 1897, denying the defendants' motion for a new trial made upon the minutes.

*Maurice Sichel*, for the appellants.

*Franklin Bien*, respondent, in person.

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RUMSEY, J. :

The defendants, as sureties for certain persons who were about to sue out a warrant of attachment against one Buchner, executed the usual undertaking upon attachment, which was delivered to Buchner at the time of the execution of the warrant. The attachment having been vacated, the plaintiff, to whom the undertaking and the right of action thereon had been assigned, brought this action to recover the damages suffered by Buchner by reason of the attachment. The defendants sought to set off against this cause of action a counterclaim, which will be more particularly referred to hereafter; but they were not permitted to do so for the reason that the action upon the undertaking was held not to be an action upon contract, and for that reason it was determined by the learned court that a counterclaim upon contract could not be set off against it.

The first question presented upon this appeal, therefore, is as to the nature of the obligation assumed by the defendants when they executed the undertaking upon the attachment. It was a voluntary agreement upon their part by which they assumed a liability to the effect that the plaintiffs in the attachment suit would pay all the costs which might be awarded to the defendant therein and the damages which he might sustain on account of the attachment. By reason of this undertaking on their part the law implied an agreement that they would pay these costs and damages if the plaintiffs in the original action did not do so. This undertaking, to be sure, did not run in terms to any particular person; but it was given to the defendant in that action, and it was understood at the time of its execution that it would be given to him and that it was for his benefit, and the agreement necessarily to be implied from it was that the defendants in this action would pay to him such costs and damages. Such an agreement is, in all its essential elements, a contract; and upon no other theory can any liability upon the part of the defendants who executed the undertaking be sustained. To make a contract it is not necessary that there should be an express promise; nor is it necessary that any particular person should be stated as the one to whom the promise is implied. It is sufficient if the circumstances are such that the law creates a duty on the part of the one sought to be charged to pay money or to do any other act — as to pay the amount of a judgment against him, or on the part of one

who has converted the property of another to pay the owner the value of the property if he chooses to waive the tort; or where one has, by fraud, obtained possession of the property or money of another to pay it back if the one whose property has been taken sees fit to regard the transaction as a contract and not insist upon it as a tort. (*Taylor v. Root*, 4 Abb. Ct. App. Dec. 382; *Coit v. Stewart*, 50 N. Y. 17; *Rothschild v. Mack*, 115 id. 1; *Andrews v. Artisans' Bank*, 26 id. 298.)

In the cases cited above the action was based upon one of the conditions just referred to; but in each case it was held to be an action upon contract, and such is the undoubted construction in such cases. The law which permits a counterclaim to be set up in an action on contract does not require that the contract, which lies at the foundation of the action, should be a perfect formal contract; but it includes an action arising from a transaction by reason of which the law implies a contract liability. In each one of the cases cited above a counterclaim upon contract was permitted to be interposed, although the cause of action in each case was one in which the circumstances were such that the law implied an agreement, although in neither of them was any agreement actually made. We have spoken of these elementary rules because the question whether an action upon an undertaking of this kind is one upon contract, so that a counterclaim can be interposed in the action, seems to have been denied, in one case at least, in this State. (*Furber v. McCarthy*, 54 Hun, 435.) But numerous other cases in this State may be cited holding the contrary of this proposition, and the case itself, we think, is not correctly decided. (*Delaney v. Miller*, 78 Hun, 18; *Atwater v. Spader*, 12 N. Y. St. Repr. 506; *Cornell v. Donovan*, 14 Daly, 295; *Wickham v. Weil*, 17 N. Y. Supp. 518.) The court was clearly wrong, therefore, in holding that a counterclaim upon contract could not be interposed in this action.

But the judgment is sought to be sustained because it is said that the claim, which the defendants endeavored to set up, did not belong to them at the time when Buchner transferred the cause of action upon the undertaking to the plaintiff in this action. This transfer was made on the 24th of December, 1896, and from that time the plaintiff became the owner of the cause of action arising upon the undertaking. No notice of the assignment, however, was given to

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the defendants in this action. At the time when the undertaking was given by the defendants in this action to Buchner, the defendant in the attachment suit, Buchner, was indebted to Lehmaier and others, the plaintiffs in that suit, in the sum of \$1,000, for money loaned to Buchner. After the attachment was vacated, which took place on the 7th of February, 1897, and on the seventeenth day of that month, Lehmaier & Co. assigned to the defendants in this action their claim of \$1,000 against Buchner, and this action was commenced two days afterwards, and the defendants here, then being the owners of the claim against Buchner, set it up as a counterclaim against the cause of action which Buchner had assigned to the plaintiff, and upon which this action is brought. The plaintiff claims that when he obtained his assignment in December, 1896, he took a cause of action against the defendants upon their undertaking, subject only to the ascertainment of the amount of the damages at the time when the attachment should be vacated, and that that cause of action became perfect by the entry of the order vacating the attachment on the 7th of February, 1897, and he insists that no claim against Buchner, thereafter assigned to these defendants, could be set up as a counterclaim against the cause of action, which had become perfect before such assignment was made. But in making that claim the plaintiff overlooks the peculiar wording of the section of the Code, which authorizes the setting up of a counterclaim. That section prescribes as one of the rules to which a counterclaim is subject that, if the action is founded upon a contract which has been assigned by a party thereto, other than a negotiable promissory note, a demand existing against the party thereto at the time of the assignment thereof, and belonging to the defendant in good faith before notice of the assignment, must be allowed as a counterclaim. (Code Civ. Proc. § 502.) It will be noticed from this provision of the Code that a defendant who is liable upon a contract which has been assigned to some third party, may protect himself against that contract even in the hands of the assignee by the purchase of a cause of action against his original creditor, at any time before notice of the assignment. If the plaintiff desires to avoid such a counterclaim it is his duty to give notice to the debtor of the assignment to him; and until he does so that debtor is in a situation to avail himself of any counterclaim against the assignor of the contract of

which he becomes possessed. (*Faulknor v. Swart*, 55 Hun, 261.) Therefore, the defendants in this action were acting within their rights when they purchased this claim which they now seek to set up as a counterclaim; and the court erred in refusing them permission to avail themselves of it.

For these reasons the judgment and order should be reversed and a new trial granted, with costs to appellants to abide event.

VAN BRUNT, P. J    BARRETT, PATTERSON and O'BRIEN, JJ.,  
concurring.

Judgment and order reversed, new trial granted, costs to appellant to abide event.

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JULIUS BERNSTEIN and JACOB WINDMAN, Appellants, v. DAVID F.  
HAMILTON and HENRY MESSENGER, Respondents.

*Interpleader—granted only where the defendant admits a liability for the full amount.*

An order of interpleader will only be granted where the defendant admits a liability to some one for the full amount claimed, and the only question is to whom he owes it.

APPEAL by the plaintiffs, Julius Bernstein and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of December, 1897, granting the defendants' motion to interplead one Aaron Wainess as a defendant in the action, and relieving the defendants from all liability upon paying to the plaintiffs the sum of \$88, and interest from August 8, 1897.

*Jacob Levy*, for the appellants.

*Augustus J. Koehler*, for the respondents.

RUMSEY, J.:

The plaintiffs claim that they are entitled to recover from the defendants the amount of \$176 for commissions which they earned upon the sale of certain real estate belonging to or under the control

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of the defendants. No answer has been interposed. The defendants, however, moved in due time that one Aaron Wainess should be substituted as a defendant for the reason that, as they say, Wainess claims to be entitled to one-half of the commissions pursuant to an agreement made by him with one of the defendants and one of the plaintiffs. This contract, however, is denied by the plaintiffs. The moving papers do not admit, in terms, a liability existing on the part of the defendants towards the plaintiffs for these commissions, or for anything else; on the contrary, there is an affidavit of merits in which it is stated that the defendants have a good and substantial defense on the merits to the cause of action set forth in the complaint.

In the face of this allegation the defendants have no right to an interpleader, which can only be ordered when the defendant admits a liability to some one for the full amount claimed, and the only question is to whom he owes it. (*Baltimore & Ohio R. R. Co. v. Arthur*, 90 N. Y. 234.) There is no admission of that kind in these papers, but the contrary. It may be that the defendants are indebted not only to the plaintiffs, but to Wainess, but that fact is of no importance here. It is sufficient that the defendants do not concede that they are indebted to the plaintiffs in the amount of this claim, or in any amount, and for that reason this order should not have been granted.

The order is reversed, with ten dollars costs and disbursements, and the motion of interpleader is denied, with ten dollars costs.

VAN BRUNT, P. J., BARRETT and McLAUGHLIN, JJ., concurred;  
O'BRIEN, J., concurred in result.

O'BRIEN, J. :

I concur in the result. Too much weight is given to the affidavit. It seems to me that though one may have a good defense he need not insist upon it, but may waive it, and in so doing is not prejudiced in making any other application, or seeking any other relief to which he is entitled.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS ALLISON,  
Respondent, v. THE BOARD OF EDUCATION OF THE CITY OF NEW  
YORK, Appellant.

*New York city — bills of an attorney designated to act in a proceeding to take property for the board of education — the taxation thereof by a justice of the Supreme Court is a judicial act — mandamus.*

The action of a justice of the Supreme Court in taxing, under section 2 of chapter 393 of the Laws of 1896, the bills of an attorney, designated by the corporation counsel of the city of New York, pursuant to section 1 of that act, to appear for the city of New York in proceedings for the taking of property for the purposes of its board of education, is judicial, and his conclusion thereon cannot be questioned collaterally by the board of education, which may be compelled by mandamus to make the requisition on the Comptroller required by chapter 728 of the Laws of 1896 for the payment of a bill so taxed.

APPEAL by the defendant, The Board of Education of the City of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 13th day of January, 1898, granting a peremptory writ of mandamus requiring the defendant to make requisition upon the comptroller for the payment of two bills presented to it by the relator.

*E. Ellery Anderson*, for the appellant.

*Charles E. Miller*, for the respondent.

*Theodore Connolly*, of counsel to the corporation.

RUMSEY, J.:

In the year 1896 proceedings were begun to take, for the purposes of the board of education, certain property situated in the city of New York. In pursuance of the authority granted by section 1 of chapter 393 of the Laws of 1896, the corporation counsel designated the relator to appear before the commissioners who were appointed in those proceedings and protect the interests of the city. Such appearance was had pursuant to the designation, and, after the proceedings had been terminated, the relator presented the bill for his fees in each proceeding to the corporation counsel, with an affi-

davit of its correctness, in the form required by law, with a notice that the bill would be presented to a justice of the Supreme Court for taxation five days thereafter, as required by the statute. The bill was accordingly presented to the judge, in pursuance of the notice, and was by him taxed at the sum claimed by the relator.

By chapter 728 of the Laws of 1896, the comptroller of the city of New York was required to issue bonds to a sum mentioned therein, to be known as schoolhouse bonds, which are to be used in payment for the purchase of school sites, and for the erection of buildings and fitting up and furnishing them, but it was expressly provided that no expenditure from the proceeds of these bonds should be authorized or made without the approval and requisition of the board of education. After the bills of the relator had been taxed, pursuant to the notice, he made application to the appellant here to approve them and to send a requisition to the comptroller for their payment, which the board of education refused to do. Thereupon this proceeding was begun to require the board to take that step. It defends the proceeding upon the ground that the bills are exorbitant, and that proper proof was not furnished to the justice by whom they were taxed to warrant his taxing the bills at the amount presented.

We are of opinion that the defendant cannot raise the question of the propriety of the taxation upon this hearing. The statute intended that these bills should be paid as a portion of the expenses of securing the schoolhouse sites. The amount of these expenses was to be fixed in the manner prescribed by section 2 of chapter 393 of the Laws of 1896, and that was by taxing the bills before a justice of this court on five days' notice to the counsel to the corporation. When the bills were presented to the judge for taxation, it was his duty to pass upon the question of the reasonableness of their amount upon such proof as might be before him. His act in so doing was a judicial act, and his conclusion thereon is a determination as to the amount of those bills which cannot be questioned in any collateral proceeding, and only, if at all, in the same way as other judicial determinations. The appellant, therefore, was not in a situation to raise upon this hearing the question whether the bills were taxed at the proper amount or not. When it had been made to appear to it that the proper steps had been taken to adjust



the amount of these bills, and they had been taxed by a judge in the way prescribed by law, the appellant was bound to take the steps dictated by the statute to enable the person whose bills were so adjusted to procure his pay out of the fund provided for that purpose.

The order for a mandamus was, therefore, properly granted and should be affirmed, with costs and disbursements.

VAN BRUNT, P. J., BARRETT, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order affirmed, with costs and disbursements.

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SARAH SCHICK, Appellant, v. JACOB FLEISCHHAUER, Respondent.

*Promise of a landlord to repair a ceiling — personal injury to the tenant from its breach — liability of the landlord — remedy of the tenant.*

A contract made by a landlord with his tenant to repair a ceiling in the demised premises, in reliance upon which the tenant renews her lease of the premises, does not create a liability on the part of the landlord for personal injuries sustained by the tenant through its breach and the consequent fall of the ceiling upon her.

Remedy of the tenant in the event of the breach by the landlord of a promise to repair, considered.

APPEAL by the plaintiff, Sarah Schick, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 1st day of November, 1897, upon the decision of the court rendered after a trial at the New York Special Term sustaining the defendant's demurrer to the plaintiff's complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action.

*Abraham Oberstein*, for the appellant.

*Herbert C. Smyth*, for the respondent.

RUMSEY, J. :

The complaint alleges, substantially, that the plaintiff was a tenant of certain apartments in a building owned by the defendant in the

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city of New York, and that on the 4th of June, 1897, she was injured by the falling of the ceiling in the apartments. The complaint further alleges that the agent of the defendant was aware of the condition of the premises; that before her term began he had promised the plaintiff, in behalf of the defendant, to repair the ceiling and put it in a safe condition, and that, relying upon such promise, she had renewed her lease of the said premises. The complaint then contains allegations that the defendant did not cause the premises to be repaired as he had agreed, and the usual allegations as to the amount of damages. The demurrer is upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

The only relation between the parties is that of landlord and tenant. It is well settled in this State that no duty rests upon the landlord to repair premises which he has demised, or to keep them in tenable condition, and that there can be no obligation to repair except such as may be created by the agreement of the landlord so to do. (*Witty v. Matthews*, 52 N. Y. 512.) Where such agreement has been made, the measure of damages for the breach of the contract is the expense of doing the work which the landlord agreed to do but did not. A contract to repair does not contemplate, as damages for the failure to keep it, that any liability for personal injuries shall grow out of the defective condition of the premises; because the duty of the tenant, if the landlord fails to keep his contract to repair, is to perform the work himself and recover the cost in an action for that purpose, or upon a counterclaim in an action for the rent, or, if the premises are made untenable by reason of the breach of the contract, the tenant may move out and defend in an action for the rent as upon an eviction. (*Myers v. Burns*, 35 N. Y. 269; *Sparks v. Bassett*, 49 N. Y. Super. Ct. 270; 1 Taylor Landl. & Ten. [8th ed.] 380.) The tenant is not at liberty, if the landlord fails to keep his contract to repair the premises, to permit them to remain in an unsafe condition and to stay there at the risk of receiving injury on account of the defects in the premises and then recover as for negligence for any injuries that he may suffer. Where the sole relation between two parties is contractual in its nature, a breach of the contract does not usually create a liability as for negligence. In such a case the liability of one of the parties

to the other because of negligence is based either on the breach of some duty which is implied as the result of entering into the contractual relation, or from the improper manner of doing some act which the contract provided for; but the mere violation of a contract, where there is no general duty, is not the subject of an action of tort. (*Courtenay v. Earle*, 10 C. B. 83; *Tuttle v. Gilbert Manufacturing Co.*, 145 Mass. 169.) As the result of this principle, we conclude that the plaintiff cannot maintain an action against the defendant to recover the damages which she has suffered on the ground of the defendant's negligence in failing to keep his contract to repair. Such is the weight of authority in this country. (*Miller v. Rinaldo*, 21 Misc. Rep. 470; *Tuttle v. Gilbert Manufacturing Co.*, *supra*; *Flynn v. Hatton*, 43 How. Pr. 333; *Spellman v. Bannigan*, 36 Hun, 174.)

The cases relied upon by the plaintiff are easily distinguishable. In *White v. Sprague* (9 N. Y. St. Repr. 220) the plaintiff was employed by the defendant as janitor of an apartment house belonging to the defendant, and she was injured by the falling of the plastering while at work in a portion of the building. For these injuries she was permitted to recover. In the opinion it was suggested that the landlord might have been liable by reason of his failure to perform his agreement to put the premises in repair, yet it is evident that the liability in that case might well have stood upon the duty of the landlord as an employer to the plaintiff as his servant, and upon that theory only could the case be sustained. The plaintiff also relies upon the case of *Edwards v. New York & Harlem Railroad Co.* (98 N. Y. 245). In that case the defendant had leased premises to be used for an exhibition. A gallery had been placed in the hall to accommodate a few people for special purposes, but it was not intended to permit the audience generally to occupy it. The lessee of the premises removed fixtures which had been put in the balcony, and allowed it to be crowded with the miscellaneous audience, and, as the result, the balcony fell, injuring the plaintiff. The court held that as the balcony was intended only to be used for a special purpose, and as there was no proof that it was not sufficient for the purpose for which it was intended, the landlord was not liable for an accident which was caused by a different use. It is true that in that case Judge EARL said that if

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the landlord lets premises and agrees to keep them in repair, and fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. But the liability of the landlord in that case was not claimed to exist upon any such ground, and it was said by the court that if any responsibility could attach to the landlord, it could not be based upon the contract obligation, but must rest entirely upon his *delictum*.

Each of the cases cited by the plaintiff will be found to stand upon the same principle. For this reason she cannot depend upon any one of them as authority to sustain her claim. The interlocutory judgment must, therefore, be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, PATTERSON and O'BRIEN, JJ., concurred.

Judgment affirmed, with costs, with leave to the plaintiff to amend within twenty days on payment of costs in this court and in the court below.

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ALEXANDER P. W. KINNAN, Appellant, v. SULLIVAN COUNTY CLUB and Others, Respondents.

*Corporation — power to make by-laws limiting the right to vote upon or to transfer its stock until dues are paid.*

The right of a stockholder in a corporation to vote upon and to transfer his stock can be limited, if at all, only by an express statutory provision, or by a provision in the articles of association; a by-law by which a stockholder is prevented from voting upon or transferring his stock until all dues thereon have been paid is invalid, even as against a stockholder who agreed to take his stock subject to "the by-laws \* \* \* as to dues and transfers."

Section 11 of the General Corporation Law (Laws of 1890, chap. 563), empowering a corporation to make by-laws regulating the transfer of its stock, only authorizes the corporation to prescribe the officer by whom the stock shall be transferred and the mode of its transfer; it does not authorize an imposition upon the stock of a penalty limiting the unconditional right of transferring it.

APPEAL by the plaintiff, Alexander P. W. Kinnan, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 15th day of October, 1897, upon the decision of the court rendered after a

trial at the New York Special Term dismissing the complaint upon the merits, and also from an order entered in said clerk's office on the 12th day of October, 1897, upon which said judgment was entered.

The action was brought by the plaintiff, a stockholder in the defendant corporation, to have certain by-laws of said corporation adjudged to be void, and to enjoin the defendants from preventing the plaintiff and all other stockholders similarly situated from voting on their stock at the annual meeting of the corporation.

*Charles Henry Butler*, for the appellant.

*Isaac L. Miller*, for the respondents.

RUMSEY, J. :

No case and exceptions was made by the appellant, but the only papers he presents upon this appeal are the judgment roll, which contains the decision of the court, and a stipulation that the facts found in the decision are the facts in the case. There are presented, therefore, only questions of law, and in order that the appellant should succeed in his appeal it is incumbent upon him to show that the trial court could not, upon any view of the facts found, order the judgment which it did. (*Agri. Ins. Co. v. Barnard*, 96 N. Y. 525.)

The facts are that the Sullivan County Club is a corporation organized under the Business Corporation Law of this State (Laws of 1890, chap. 567) in the month of December, 1892, with a capital of \$100,000 divided into shares of \$100 each. On the 4th of January, 1893, the corporation issued 500 shares of its stock to two persons in payment for a tract of land situate in Sullivan county, and afterwards from time to time the corporation sold 200 shares more, but the remainder of the stock is not yet issued. Shortly after the organization of the corporation and before the stock was sold a circular was issued announcing the objects for which it was organized. Among other things it was stated that every stockholder would have, not only a general interest in the entire tract of land and all improvements, but a membership in the club and the use of the club house, which would be run as a family hotel, on payment of an annual subscription limited to five dollars for individuals and ten dollars for families.

Certificates of stock were not issued at the time it was sold, nor until the month of May, 1893. In that month, and before any certificates of stock were issued, the directors of the corporation adopted by-laws, one of which was as follows: "The board of directors shall have power to establish such rules, regulations and restrictions for the government of the club and the use of its property and dues, not to exceed ten dollars per share, and may provide such penalty for any violation thereof, not inconsistent with the laws of this State, as it may deem expedient." It does not appear that at this time the stockholders, acting as such, had adopted any by-laws for the corporation. After the directors' by-law above quoted had been adopted, certificates of shares were issued which contained the statement that the shares were "Full paid and non-assessable beyond ten dollars per annum." These certificates were bound into a book, and the following statement was printed on the stub to which each certificate was attached: "Received the above certificate, which I accept and agree to hold pursuant to the by-laws of the Sullivan County Club, as to dues and transfers." Some of the stockholders, to whom certificates of stock had been issued, signed this receipt and contract upon the stub, and others did not. The plaintiff was not one of the original incorporators, but he became a stockholder by the purchase of a share of stock in the year 1894. At the time the certificate of stock was issued to him he signed the receipt and contract, which was printed upon the stub, and the defendants claim that he thereby agreed to be bound by the by-laws which then authorized an annual charge of ten dollars on each share of stock. The plaintiff, however, denies that this by-law is a valid one or that he has become liable to pay the charge upon his stock, which it is claimed to create. If this position is well taken, he has a perfect defense at law to any action which shall be brought for that purpose, and, that being so, there was no reason why he should bring this suit to restrain the corporation from beginning an action at law to recover that sum of money. (*Thomas v. The M. M. P. Union*, 121 N. Y. 45.) Whether or not the by-law is valid, so far as it levies such a charge on the stock, need not be decided upon this appeal.

It appears, however, that the corporation threatens to refuse to transfer the plaintiff's stock upon the books of the company, or to

permit the plaintiff to vote thereon until all unpaid dues upon the stock shall have been paid. The corporation intends to take this action upon the authority of a by-law adopted by the stockholders at a meeting in January, 1895, and after the plaintiff had become the owner of this stock. The right of the corporation, as such, to make by-laws is given by section 11 of the General Corporation Law (Laws of 1890, chap. 563), by which, among other things, it is said that it may make by-laws for the regulation of its affairs and the transfer of its stock, if it has any.

It has no other power to make a by-law regulating the transfer of its stock except such as is given by this law, and a fair construction of that law will not authorize the corporation to do any more than to prescribe the officer by whom the stock shall be transferred and the mode of its transfer, but it is not sufficient to authorize an imposition upon the stock of any penalties by way of limiting the unconditional right of transferring it. This provision of the statute does not, by implication, give to the corporation any power to disqualify its members, except such as it had before. But a corporation never had, in this State, the right, by means of a by-law, to limit or take away the power of a stockholder to transfer his stock. If such transfer could be limited at all, it could be only by a provision in the articles of association. (*Bank of Attica v. M. & T. Bank*, 20 N. Y. 501; *Driscoll v. W. B. & C. M. Co.*, 59 id. 96.) The articles of association of this company contain no such power, and, therefore, they have no right by a by-law to prevent the transfer of the plaintiff's stock, whether such by-law be made by the directors or by the stockholders at a regular meeting.

The corporation has no more power by its by-laws to refuse to permit a delinquent stockholder to vote upon his stock than it has to refuse him the privilege of making a transfer of the stock. The right to vote upon stock of a corporation is essential for the protection of its owner. It is one of those inherent rights which go with the purchase of the stock, and, unless it is limited by the articles of association authorizing the corporation to exclude from the right of voting a person who is in arrears upon his stock, the right does not exist. It cannot be arrogated by the corporation to itself after the stock has been issued. It makes no dif-

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ference in this regard whether the stockholder agrees to take the stock subject to the by-laws of the corporation or not. No by-law can be made which takes away from a stockholder a right which is vested in him at the time of the purchase of his stock. The power to take away the franchise of a stockholder stands upon the same footing precisely as the power to prevent the transfer of stock. Neither of them can be exercised upon the authority of a by-law, but each depends for its existence either upon express provision of the statute, or, at least, upon the articles of association of the corporation. For these reasons the plaintiff was entitled, at least, to an injunction restraining the corporation from refusing to transfer the stock until the dues should have been paid and from refusing to allow him to vote upon his stock at the annual meeting, and the court erred in denying him that relief.

The judgment should, therefore, be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., BARRETT, PATTERSON and O'BRIEN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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JAMES E. KELLY, Appellant, v. LUCINDA BAKER, Respondent.

*Contract — sufficiency of a complaint for its enforcement — attachment of savings bank accounts.*

In an action to enforce an agreement by which the defendant agreed to pay a certain sum to the plaintiff on condition that the plaintiff should first furnish a certain release, a complaint which alleges that, after the time for the payment of the money had arrived, the plaintiff tendered the release and demanded payment, but that this was refused, and that the plaintiff now is and always has been ready to deliver the release upon receiving the payment, states a cause of action.

The levy of an attachment upon savings bank accounts standing in the name of the attachment debtor will not be disturbed upon the ground that the moneys represented by the accounts belonged to an estate where it appears that the attachment debtor was not only executrix of the estate but also residuary legatee — certainly until the sheriff has had an opportunity to be heard in the matter.

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APPEAL by the plaintiff, James E. Kelly, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of January, 1898, vacating a warrant of attachment.

*James E. Kelly*, appellant, in person.

*T. M. Tyng*, for the respondent.

RUMSEY, J. :

The action was brought to recover a sum of money upon a contract, by which the defendant agreed to pay to the plaintiff \$2,500 at a certain time, upon condition that the plaintiff should first furnish to the defendant a general release, specified in the contract. The defendant was a non-resident, and, upon that ground, the plaintiff procured an attachment. The defendant moved to vacate the attachment for the reason that the complaint did not allege facts sufficient to constitute a cause of action. The defect insisted upon was that the plaintiff had not shown that he had performed that portion of his contract which required him to furnish the general release, and that, for that reason, he was not entitled to the money claimed. The allegation upon that point is that, after the time for the payment of the money had arrived, the plaintiff tendered such release to the defendant, and demanded from her the said sum provided in the instrument to be paid, but that the defendant refused to pay, and has not paid, the sum or any part thereof, and that the plaintiff now is and always has been ready and willing to deliver said release to the defendant upon receiving the said payment.

We think that the allegation was sufficient to show that the plaintiff had done all he was required to do to entitle him to the payment of the money. The agreement to furnish the release, and the corresponding agreement on the part of the defendant to pay the money, were substantially mutual conditions, and to be performed at the same time. In such a case, if the person who claims to be entitled to the money alleges a tender of performance on his part, and a demand of performance by the defendant which is refused, he sets up a good cause of action. (*Pordage v. Cole*, 1 Saund. [Williams' Notes] 320e; *Laird v. Pin*, 7 M. & W. 474.) The conclusion of the learned judge below, that a cause of action was not set up, was erroneous.

It is claimed also by the defendant that the levy was improper, and should be vacated. It appears that the sheriff levied upon two bank accounts standing in the defendant's name in certain savings banks in this city, which the defendant claims do not belong to her personally, but as executrix of the will of Eliza Schneider, deceased. From the facts set out in the opposing affidavits, however, it appears that the defendant is not only the executrix of Eliza Schneider, but is her residuary legatee, and that she has a beneficial interest in the estate of Eliza Schneider, after the payment of all debts and expenses of administration, much larger than the amount of the plaintiff's claim. But this is not of much importance. The defendant has received that money and undertaken to deal with it as her own. That being so, it is not necessary to examine in this case whether she actually owns the money, or whether she is bound to account to some other person or estate for it. The sheriff was bound to levy upon it, and his levy cannot be interfered with until, at least, he has had an opportunity to be heard in regard to the matter.

The order appealed from must, therefore, be reversed, with ten dollars costs and disbursements, and the motion to vacate the attachment and levy denied, with ten dollars costs.

VAN BRUNT, P. J., BARRETT, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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JOHN I. BLAIR, Appellant, v. GEORGE HAGEMEYER and CASPAR HAGEMEYER, Doing Business under the Firm Name of GEO. HAGEMEYER & SONS, and Others, Respondents.

*A note valid in its inception—it may be sold at any price—burden of proof as to its diversion from the purpose for which it was given.*

Where a note had a business inception at the time it was made it is immaterial, in an action against the payee, what a subsequent holder paid for it.

Where, in an action upon a promissory note, the defense that it was diverted from the purpose for which it was given is interposed, the defendants must, in order to defeat a recovery, show that the plaintiff, presumptively a *bona fide*

holder thereof for value and before maturity, had notice of the diversion or adduce some clear evidence that he was guilty of bad faith in taking the note. Evidence considered upon which it was held to be erroneous for the trial court to take from the jury the questions as to the circumstances under which a promissory note was given, as to whether it had been diverted from the purpose for which it was given, and as to whether the plaintiff was a *bona fide* holder for value thereof.

APPEAL by the plaintiff, John I. Blair, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 30th day of June, 1897, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

*Rush Taggart*, for the appellant.

*W. C. Beecher*, for the respondents.

PATTERSON, J. :

This action is upon a promissory note for \$7,500, made by the defendants Hagemeyer in their firm name of George Hagemeyer & Sons, payable to the order of William H. Chew and indorsed by him and Charles C. Cokefair. The defendants Hagemeyer and Chew answered the complaint; the defendant Cokefair made default. Pending suit, Hagemeyer & Sons made an assignment for the benefit of creditors to one Hutchinson, who, by permission of this court, intervened and interposed an answer. The amended complaint contains the ordinary allegations proper to an action of this character against the makers and indorsers of a negotiable instrument, and also sets up the introduction in the suit of the assignee Hutchinson. The answers of Hagemeyer & Sons and of their assignee are substantially the same. The making and indorsement of the promissory note are admitted, but it is alleged as a separate defense that the note sued upon was one of a series made by the defendants Hagemeyer & Sons to the order of Chew, delivered without other consideration than for the purpose of having the same discounted under an agreement with Chew, whereby the proceeds of the discounts were to be used in paying off and retiring certain other promissory notes which had theretofore been made by the firm of Chew & Eadie, composed of the defendant Chew and one Eadie, and which notes had belonged to and had been indorsed by the firm

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of George Hagemeyer & Sons. These answers then proceed to set up that Chew, without consideration, delivered the note sued upon to one Cokefair and that no part of the proceeds had been applied as required by the agreement alleged to have been made between Chew and Hagemeyer & Sons. That defense is in substance one of a diversion of commercial paper from the purpose for which it was issued. The same answers contain a further separate defense, that the note sued on was delivered by Chew to Cokefair on a prior unlawful and usurious agreement whereby Cokefair was to, and did, retain fifty per cent of the face value of the note or thereabouts. That defense was intended to raise the issue of the note having no legal inception until its transfer by Chew to Cokefair, and that it was usurious in that inception. These answers also contain a further defense that Cokefair sold and delivered the note to the plaintiff upon the prior corrupt, unlawful and usurious agreement, whereby the plaintiff paid to Cokefair the sum of \$4,000, and retained for his own benefit and account the balance of the notes to be applied upon a prior and personal indebtedness of Cokefair to the plaintiff, all of which was without the knowledge or consent of Hagemeyer & Sons or of the assignee — the last defense being intended to present the question of the note having no inception until Cokefair disposed of it to the plaintiff upon the alleged unlawful and corrupt agreement. The answer of the defendant Chew admits the indorsement and delivery of the note by him to Cokefair, and that he (Chew) has not paid the amount of the note, and then sets up affirmatively that the note was delivered to the plaintiff, and had no real inception until such delivery, and that the plaintiff discounted the note and saved and reserved to himself more than six per cent of the face value of the note, which transaction on his part was usurious.

Upon the issues framed by these answers the case came on for trial, and for some reason not disclosed, the plaintiff, instead of resting upon the presumption of *bona fides* resulting from his possession of the promissory note, undertook to show by witnesses the circumstances under which Blair, the plaintiff, took the note, and also the circumstances under which it was issued originally, and also statements and admissions of the makers of the note, made before the plaintiff took it. The witness Roseman testified that he was the

cashier of the plaintiff and that he purchased the note for the plaintiff; that before purchasing it he called upon Hagemeyer & Sons with a copy of the note, saw Mr. George Hagemeyer, one of the makers, who referred to a record, compared the note with the record, and said that the note was all right and would be paid at maturity, and also stated that Hagemeyer & Sons had purchased certain timber lands, and that the note had been given in part payment for those lands. The witness then testified that he bought the note from Cokefair, the purchase being consummated after the interview with Mr. George Hagemeyer. He also stated that the consideration paid to Cokefair consisted of cash by check of \$3,258.66, a satisfaction piece of a judgment of one Fox against Cokefair for \$3,458.87, the surrender of certain bonds at a value of \$543.72 and \$50 for the attorney's fee with respect to the Cokefair judgment. These items altogether amount to the sum of \$7,311.25, the difference between that amount and the face value of the note, \$188.75, being the discount at six per cent. There is some vagueness with reference to the value of the surrendered bonds, that is to say, the \$543.72 item; but there is proof of their having been accepted by Cokefair at that figure.

The evidence of Chew was directed principally to the consideration upon which the note was originally issued. He testified at one time positively that the note was issued in part payment for land situated in North Carolina and sold by him to Hagemeyer, and said that it was not issued to take up one of the notes of Chew and Eadie, and, in another part of his examination, he testified that the note in suit was given substantially as claimed by the Hagemeyers. These were contradictions to be looked at very seriously, for the first version Chew gave of the consideration for which the note was originally issued accords exactly with what the witness Roseman testified that George Hagemeyer told him before he purchased the note for Blair. The testimony of Cokefair is substantially to the same effect concerning the purchase of the note by the plaintiff, as that of the witness Roseman.

When the proofs were all in, counsel for each of the parties requested the court to direct a verdict, which requests were taken under advisement and subsequently denied, and the court directed that the case go to the jury. But, while counsel for one of the parties was

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addressing the jury, the learned judge inquired whether the request of each party for the direction of a verdict was still open. Counsel for the defendants replied affirmatively; counsel for the plaintiff stated that his motion for the direction of a verdict in his favor was withdrawn. Thereupon the court took the case from the jury and dismissed the complaint on the ground that the note sued upon was diverted paper, and that the plaintiff, having failed to show that he was the owner in good faith for value of the note, the complaint must be dismissed. From the judgment entered upon that dismissal this appeal is taken.

It will thus be seen that the learned judge disposed of the case by determining himself that the note sued on was, as matter of fact, diverted paper, and that the plaintiff had failed to show that he was a holder for value of that paper. In taking that action he was manifestly wrong. The issue of fact as to the purpose for which the note was originally issued was peculiarly a matter for the consideration of the jury. There was testimony of admissions by one of the makers of the note, and of at least one declaration of the witness Chew, the indorser of the note (although the latter subsequently qualified it), that it was issued originally in payment for land which Chew had sold to Hagemeyer, and on that evidence the plaintiff was entitled to go to the jury, either as to the fact of the consideration of the note at its inception, or as raising an estoppel against Hagemeyer from disputing that consideration; the evidence of Roseman being that, before the note was purchased from Cokefair, those inquiries were made of the maker of the note upon the faith of the answers to which the note was bought; and as against Chew, the only defense interposed by his answer being that the note had no legal inception until it was delivered to the plaintiff, who discounted it at a usurious rate. The question of fact relating to the original inception of the note was the vital one; for if it had a business inception at the time it was made, then it is entirely immaterial, so far as Chew is concerned, what the plaintiff gave for it subsequently. As regards Chew, it was for the jury to pass upon his credibility and to say whether they would believe his first or his last statement respecting the consideration for the note and when it had its inception.

The learned judge was also incorrect in taking the case away from

the jury on the ground that the plaintiff failed to show that he was the owner in good faith and for value of the note in suit. It would seem that this question arose in the mind of the court, because of some doubt entertained respecting the Fox judgment, and the ownership of that judgment by Blair at the time the satisfaction piece was delivered to Cokefair. As the case stood, there was evidence to show that the plaintiff *was* a *bona fide* holder for value. The circumstances under which the note was bought were sworn to by Roseman, and if his story was to be believed, there could be no doubt of the plaintiff being a *bona fide* holder for value. The purchase was made from Cokefair who held the note; money and bonds and the surrender of a judgment against Cokefair were the consideration. So far as the judgment was concerned, the extinguishment of the debt to Cokefair was a good consideration *pro tanto* for the note. (*Mayer v. Heidelberg*, 123 N. Y. 332.) The debt of Cokefair on the Fox judgment was paid, and that judgment was satisfied. The question of the ownership of that judgment by Blair was not in any way involved. It did not appear that the satisfaction piece was signed by Blair; the presumption is that it was executed by Fox, but it was for an indebtedness which was sworn to as being one of Cokefair to Blair, Fox being apparently a nominal plaintiff. It was, therefore, shown that the plaintiff was a *bona fide* holder for value of this note, and even if it were diverted paper, it was incumbent upon the defendants, under the circumstances, to show, before a recovery could be defeated, that the plaintiff had notice that it was diverted paper, or that there was some clear evidence of bad faith in his taking the paper. (*American Exchange National Bank v. New York Belting Co.*, 148 N. Y. 698; *Cheever v. Pittsburgh, etc., R. R. Co.*, 150 id. 59.)

It is urged by the respondents that the case stands as one in which both parties submitted to the court, by their requests for the direction of a verdict, those questions which otherwise it would have been for the jury to determine; but no such question arises on this record. The court expressly declined to direct a verdict and thereby left it to the jury. The court had decided that the case was one for the jury, and after that decision the plaintiff's counsel withdrew his motion for a direction in his favor, and the court did not act upon requests for a verdict, but dismissed the complaint for failure of

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proof on the part of the plaintiff, and, as we have concluded, erroneously.

The judgment appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

VAN BRUNT, P. J., BARRETT, RUMSEY and O'BRIEN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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THOMAS W. BURFORD, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

*Municipal corporation—action for injuries caused by its negligence—a notice of intention to sue must be actually delivered—mailing is insufficient.*

Chapter 572 of the Laws of 1886, providing that no action shall be maintained against a city for damages for personal injuries resulting from its alleged negligence unless the claimant has filed a notice of his intention to commence an action upon such claim with the corporation counsel, is complied with only by a delivery thereof by or on behalf of the claimant at the office in which it is to be filed; service of such a notice by mail is insufficient.

The testimony of a witness, sworn upon the trial of an action brought against a municipal corporation to recover damages for personal injuries, that he saw in the office of the corporation counsel, in the hands of an assistant, a notice of the claim with the name of the corporation counsel written upon it, does not establish proper service thereof.

APPEAL by the plaintiff, Thomas W. Burford, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 12th day of March, 1897, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 9th day of March, 1897, denying the plaintiff's motion for a new trial made upon the minutes.

The action was brought to recover damages for personal injuries resulting to the plaintiff from the alleged negligence of the defendant.

Section 1 of chapter 572 of the Laws of 1886, referred to in the opinion, provided as follows:

"No action against the mayor, aldermen and commonalty of any



city in this State having fifty thousand inhabitants or over, for damages for personal injuries alleged to have been sustained by reason of the negligence of such mayor, aldermen and commonalty, or of any department, board, officer, agent or employee of said corporation, shall be maintained unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action and of the time and place at which the injuries were received, shall have been filed with the counsel to the corporation or other proper law officer thereof within six months after such cause of action shall have accrued."

*J. W. Bryant*, for the appellant.

*T. Connolly*, for the respondent.

PATTERSON, J.:

On the argument of this cause counsel declared that the only question for the consideration of the court on this appeal was the sufficiency of the proof made by the plaintiff of the service of the notice of claim required to be filed with the corporation counsel by chapter 572 of the Laws of 1886. It appeared in evidence that a notice sufficient in form was served upon the comptroller of the city of New York, but we have held that such a notice, even if traced into the hands of the corporation counsel, is not a sufficient compliance with the requirement of the law. (*Missano v. The Mayor*, 17 App. Div. 536.) It was also shown by the plaintiff that an attempt at service of the necessary notice upon the counsel to the corporation was made by mailing it. Service of such a notice by mail is insufficient. The purpose of the statute is that direct written notice shall be given, and that it *shall be filed* with the corporation counsel. That requirement imposes upon the claimant the duty of doing everything necessary to put the corporation counsel in physical possession of the notice so that it may be said to be on file with him — mailing is not the equivalent of filing required by the statute. Delivery by or on behalf of the claimant at the office in which the filing is to be made will alone satisfy the statute. As was said in *Gates v. The State* (128 N. Y. 221), in commenting upon another statute respecting the filing of claims, "if we should hold that the mailing by a claimant of his claim directed to the canal appraisers was equivalent to

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a filing in the office, I think we should be disregarding the plain reading of the law and denying to the words of the statute their plain and usual force and significance."

But there was some slight evidence on the trial that the corporation counsel had received a notice, a witness testifying that he saw in the corporation counsel's office, in the hands of an assistant, a notice of claim with the name of the corporation counsel written upon it, and the contention is, therefore, made that the notice was, to all intents and purposes, filed and the law complied with; and that, inasmuch as the object of the statute was accomplished, the means by which that was done became immaterial. The plaintiff was examined by the corporation counsel, and it was upon the occasion of that examination that the notice addressed to the corporation counsel was seen in the hands of his assistant conducting the examination.

That slight evidence was not enough to show a delivery of the notice at the corporation counsel's office in the manner required by law. It is of the utmost importance that this statute should be strictly complied with. How, when or under what circumstances the assistant corporation counsel came into possession of the copy of the notice which was seen in his hands on the examination we do not know. No presumption that it was filed in accordance with the law can be drawn where the fact is obvious that it was not delivered as required by law, and in that respect the case differs from *McMahon v. The Mayor* (1 App. Div. 321), where, under the exceptional facts appearing in that case, we held that the notice was sufficiently filed because there was proof of its actual delivery to an assistant to the corporation counsel, who was conducting the examination of a plaintiff as to the claim set forth in the notice at the time the service was made. But here we cannot indulge in the inference of proper filing merely from the fact that in some way a notice came into the hands of an assistant to the corporation counsel, and he had it on a particular occasion. The point may seem to be technical, but it is of prime importance to the city.

The judgment dismissing the complaint must be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and O'BRIEN, JJ., concurred.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* GEORGE TYROLER,  
Appellant, *v.* THE WARDEN OF THE CITY PRISON OF THE CITY OF  
NEW YORK, Respondent.

*The act limiting the sale of passage tickets to common carriers and their authorized agents is constitutional.*

Chapter 506 of the Laws of 1867 (constituting §§ 615, 616 of the Penal Code), confining the sale of passage tickets exclusively to common carriers or their authorized agents, and providing for the redemption by the carriers of tickets not used, is designed to protect passengers from fraud in the sale of such tickets, and is a proper exercise of the police power of the State over the general subject of transportation. It does not deprive a person who, in consequence of it, is prevented from continuing the business of speculating in passage tickets, of life, liberty or property without due process of law, nor deny to him the equal protection of the law within the meaning of the Constitution of the United States; nor does it impair the obligation of a contract or constitute an invasion of the exclusive power of Congress to regulate interstate commerce.

APPEAL by the relator, George Tyroler, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of January, 1898, dismissing a writ of habeas corpus and remanding the relator to the custody of the warden of the city prison of the city of New York.

*Marshall & Gruber*, for the appellant.

*A. B. Gardiner*, *District Attorney*, for the respondent.

PATTERSON, J.:

George Tyroler, the appellant herein, was taken into custody upon a mandate of a committing magistrate of the city of New York, on a charge of violating the provisions of chapter 506 of the Laws of 1897 of the State of New York, and, being in such custody, was brought before a justice of the Supreme Court of the State of New York at a Special Term, upon a writ of habeas corpus. Upon the return of such writ the prisoner insisted that his detention was unlawful, for the reason that certain provisions of the statute, with the violation of which he was charged, are unconstitutional and void. The court decided adversely to that claim, the writ was dismissed, and the prisoner was remanded to the custody of the warden of the city prison. From the order entered on that decision this appeal is taken.

The prisoner was arrested upon a complaint which set forth that the complainant was a traveling salesman, residing in New York; that on the 16th of September, 1897, at No. 725 Broadway, in the city of New York, George Tyroler unlawfully and feloniously asked, took and received from such complainant the sum of six dollars and thirty cents, as consideration for a passage and conveyance, and for procurement of tickets giving and purporting to give to the complainant the absolute right to a passage and conveyance from the city of New York to the city of Norfolk, in the State of Virginia, by means of certain lines of travel and communication named in the complaint; and, further, that George Tyroler was not an authorized agent of the owners or consignees of any of the lines of transportation or vehicles of transportation by which such journey was to be performed; and, further, that the complainant paid the money for the tickets, which tickets were annexed to the complaint; and, further, that, at the time of the purchase of such tickets, the defendant admitted that he was not authorized, in writing or otherwise, by either of the companies purporting to have issued such tickets, to act as its agent.

The petition presented by the prisoner on the procurement of the writ of habeas corpus sets forth the formal matters required to be shown in petitions for such writs and the facts constituting the elements of the charge upon which he was arrested, namely, that he asked, took and received money as a consideration for a passage and conveyance and for the procurement of a ticket giving, or purporting to give, the absolute right to a passage and conveyance upon a ferryboat, railway train and vessel from the city of New York to the city of Norfolk in the State of Virginia, without being an authorized agent of the owner or consignee of such ferryboat and vessel, or of the company running such train or boat, and without being the properly authorized agent of any transportation company. The prisoner then stated in his petition that he was advised by counsel that the act of the Legislature of the State of New York in question is unconstitutional and void, in that it violates the provisions of section 1 of article 1 of the Constitution of the State of New York by depriving him of a right and privilege secured to citizens of said State, to wit, the right to sell or procure tickets for transportation over the lines of a common carrier; and

that it also violates the provisions of section 6 of article 1 of said Constitution, and of section 1 of article 14 of the amendments to the Constitution of the United States, by depriving him of his liberty without due process of law, to wit, the liberty of engaging in the aforesaid business; that it also violates the provisions of section 6 of article 1 of the Constitution of the State of New York, and of section 1 of article 14 of the amendments to the Constitution of the United States, by depriving him of his property in the ticket described in the complaint; that it violates the provisions of section 1 of article 3 of the Constitution of the State of New York, which vests the legislative power in the Senate and Assembly thereof; that it violates the provisions of section 8 of article 1 of the Constitution of the United States, which confers exclusive power on the Congress of the United States to regulate commerce among the several States, and that it violates the provisions of section 1 of article 14 of the amendments to the Constitution of the United States by denying to the petitioner the equal protection of the laws of the State of New York, and by abridging his privileges and immunities as a citizen of the United States.

So far as material to the present case, the act of the Legislature of the State of New York — chapter 506, Laws of 1897 — which went into effect on the 1st of September, 1897, contains in substance the following provisions:

No person shall issue or sell, or offer for sale, any passage ticket, or an instrument giving, or purporting to give, any right, either absolutely or upon any condition or contingency, to a passage or conveyance upon any vessel or railway train, or a berth or stateroom in any vessel, unless he is an authorized agent of the owners or consignees of such vessels or of the company running such train (with immaterial exceptions); and no person is deemed an authorized agent of such owners, consignees or company, within the meaning of the statute, unless he has received authority in writing therefor. (Such written authority to contain certain specific statements.) It further provides that no person (with an immaterial exception) shall ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train or for the procurement of any ticket or instrument giving or purporting to give a right, either absolutely or upon a condition or contin-

gency, to a passage upon the vessel or railway train, etc., unless he is an authorized agent within the provisions aforesaid; nor shall any person as such agent sell or offer to sell any such ticket, instrument, berth or stateroom, or ask, take or receive any consideration for any such passage, etc., excepting at the office designated in his appointment, nor until he has been authorized to act as such agent, according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale by the company, owners or consignees of the vessel or railway mentioned in the ticket. The statute then provides that it shall not be construed to prevent a properly authorized agent of one transportation company from purchasing tickets from the properly authorized agent of another transportation company, so that a traveler may make a continuous journey over more than one line; and then proceeds to enact that every person who shall have purchased a ticket from an authorized agent of a railway company, which shall not have been used, or shall have been used only in part, may, within thirty days after the date of the sale of the ticket, have the same redeemed and the money refunded, in case the ticket was not used, or, if only partly used, then at a proportionate value. A provision is made for the evidence upon which the proportionate value shall be determined and fixed, and the redemption of the ticket is made compulsory; and a penalty is provided to be recovered by an action from any railroad company which wrongfully refuses redemption in accordance with the provisions of the act. The provisions of the act of the Legislature referred to constitute amendments to the Penal Code of the State of New York, and are the present sections 615 and 616 of that Code. Section 618 of the same Code provides that a person guilty of a violation of any of the provisions of the preceding sections of this chapter is punishable by imprisonment in a State prison not exceeding two years, or by imprisonment in the county jail not exceeding six months.

The provisions of the law drawn in question here are contained in that chapter of the Penal Code which relates, according to its title, to frauds in the sale of passage tickets. It will scarcely be questioned that it is within the power of the Legislature of the State to pass laws to prevent, within its territory, the commission of frauds upon passengers; and it cannot be denied that the par-

ticular provisions of the chapter referred to are directed and tend to that end. The objection urged to the law and arising under the Constitution of the State, that no citizen shall be disfranchised or deprived of any of his rights unless by the law of the land or the judgment of his peers, or that he shall not be deprived of life, liberty or property without due process of law, is not well taken. There is nothing in this statute which deprives this appellant of any right he held in common with the other citizens of the State, or of his property. There were a great many conditions assumed to exist on the argument of this case which do not appear in the record, but we will take it for granted that the appellant was engaged in the occupation or pursuit of buying and selling and dealing in railroad tickets, and thus place the discussion on the same broad ground upon which it was presented. The provisions of the statute assailed prevent the continuance of that dealing, which is one relating to the business of other persons, which business is subject to governmental control and regulation. The buying and selling of railroad tickets is nothing but the buying and selling of the evidence which entitles a person to transportation by a public carrier. The issuing of tickets is a feature of the carrier's business. The regulation and control of the business of a public carrier is originally with the sovereign power conferring the franchise upon that carrier, if it be a corporation, or of the State in which the business is carried on, if the carrier is not a corporation. If the exercise of that power of regulation and control prevents a third party from securing a personal advantage, which he calls his business, he is not deprived of any constitutional right. The effect of the provisions of the act now in question is to confine the conduct of the business of common carriers in the State of New York to those carriers themselves, so far as the emission and sale and transfer by sale of tickets for transportation are concerned. Railroad tickets being merely the evidences of a contract between the carrier and a passenger, the whole relation as to their issuance and use by this law is limited to the carrier and the passenger. For a consideration paid the carrier undertakes to transport the person to whom that ticket is issued. In order to prevent fraud upon a passenger, the present statute requires that the dealing with reference to the evidence of the making of a contract of transportation shall be directly between

passenger and carrier, for when the act prescribes that the ticket shall be purchased only from an authorized agent of a company, it merely says that the purchase shall be made from the corporation itself, for the corporation cannot act otherwise than through agents, and when from any other carrier, the purchase shall be from the certified agent of such carrier. If, as a consequence of this regulation, some person who has theretofore carried on the industry of buying and selling or speculating in railway tickets, is prevented from continuing to do so, he is not deprived in any legal sense of his property right in a business. He was merely engaged in doing something, not unlawful in itself, but which might be made so by the exercise of the power the State has to regulate the business of carriers within its boundaries. He had carried on a dealing in respect to which no legislative regulation had been made before this act was passed, but, by doing so, he did not acquire a vested right as against the State to prevent its exercise of sovereignty in the control and regulation of the incidents of a traffic, to prevent frauds that might be perpetrated through and by means of that very kind of dealing which he had carried on. If the regulation, which the Legislature is competent to make, acts incidentally upon him, it does not deprive him of a general right he had, for, as has been said, the law is directed to the correction, by future prevention, of what the Legislature deemed to be a public evil, and to the security of the traveler and to the confinement of one branch of the business of common carriers to their responsible and authorized agents. The statute is not one preventing a citizen from dealing in merchandise or property generally. Such a law would clearly be unconstitutional, but the property right of a purchaser of a railroad ticket is the right to transportation to be furnished, and of which right the ticket is only the evidence. Indeed, it has been said that the ticket is the property of the carrier; that it is delivered to a passenger to be held temporarily for a special purpose, and he acquires only a special property in it, for it is to be redelivered to the carrier when the journey ends, or is about to end. (*Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 466.)

For the same reasons the statute does not infringe any of the provisions of the Constitution of the United States with reference to the deprivation of a person of his liberty or property without due process of law, nor deny to him the equal protection of the law



secured by that Constitution. This act does not deprive a person, purchasing a railroad ticket from a carrier, of his special property in that ticket; nor does it impair the obligation of a contract, for the ticket is not the contract of carriage (*Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 466; *Quimby v. Vanderbilt*, 17 id. 306; *Rúison v. P. R. R.*, 48 id. 217); nor does it confer an exclusive privilege upon any class of persons. The holder or owner of a ticket for transportation is not deprived of his property by reason of any provision of the act in question. The real effect of the law seems to be, in this connection, to make tickets purchased from common carriers non-transferable by sale. It does not prevent the giving away of a ticket, and if the carrier sells more than one ticket to one person, it directly contracts to furnish transportation to as many people selected by the purchaser as there are tickets sold to him. But special provision is made to protect the passenger in his right. If he does not wish to use the transportation, he may have his ticket redeemed and get its full value; if he wishes to use the transportation only partially, he may receive the value of the unused portion of the transportation. The holder of the ticket, therefore, is fully protected; he is deprived of nothing; he may carry out the contract and take his transportation if he wishes it; if not, he receives the equivalent in money from the carrier. Nor is there any exclusive privilege accorded by this act in the authorization of agents to sell tickets. There is no discrimination against any class of citizens; the provision that the corporation shall sell only through its agents is merely a declaration that the corporation itself shall sell its tickets, and, as applied to the unincorporated carriers, it does not limit the selection of agents to any class. Tickets can only be sold by individuals acting as the agents of the corporations or other carriers, and it is no discrimination causing an unequal operation of the law for the corporate body to select the persons who shall act as its agents, or the unincorporated carrier its servants. There is no monopoly in the business of selling tickets accorded by that feature of the act. Upon the several matters thus far considered, respecting constitutional objections to the act in question, we have nothing more than has been said above to add to the reasoning in the cases of *Burdick v. The People* (149 Ill. 600); *The State v. Corbett* (57 Minn. 345), and *Commonwealth v. Wilson* (14 Phila. 384), and it

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would be a mere parade of learning to refer particularly to the authorities cited and considered by the learned judges who wrote the opinions of the court in those cases.

But it is objected that the legislation now under consideration is void, because it invades the exclusive power of the Congress of the United States to control interstate commerce. Undoubtedly, the transportation of passengers is a branch of commerce, and undoubtedly a contract to transport a passenger from New York to Norfolk, in the State of Virginia, relates, in a sense, to interstate commerce. The real question involved in this branch of the case is whether the legislation of the State of New York, that we have been considering, constitutes a "regulation" of *interstate* commerce, in the sense in which that word "regulation" is used in the Constitution of the United States. In the first place, it is to be observed that it does not in any way affect the fact of transportation; it does not in any way hinder or obstruct or trammel a passenger seeking to make a contract of transportation with any carrier. It is merely, in the relation now under consideration, a statute designating and defining, as a police regulation operating within the State of New York, the persons with whom, and the places at which, arrangements for transportation shall be made, prohibiting, under penalties, the selling of tickets by any other persons or in any other places, and confining those incidents of business to the carriers themselves and the persons they authorize to issue evidences of the contract for them. Why is this done? For the security and protection of persons seeking transportation by common carriers within the State, and in order that such persons may not be imposed upon. That cannot be called a general regulation of commerce. It may affect a person before the relation of passenger and carrier is constituted, but it falls within the general power of the State to regulate and control, for the general welfare, the conduct of legitimate business, within its own boundaries. As was remarked in *Hull v. De Cuir* (95 U. S. 487): "Legislation may, in a great variety of ways, affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution" (citing authorities), and "the line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently

differ in their reasons for a decision in which they concur." In that case it was held that a statute of the State of Louisiana, which required persons engaged in the transportation of passengers among the States to give all passengers traveling within the State equal rights and privileges, was unconstitutional, because it was a regulation of interstate commerce. It related only to travel; but the utmost that can be said with reference to the statute of the State of New York, as affecting commerce between the States, is that it includes the sale of tickets for transportation such as those sold by this appellant. Nevertheless, it seems to be indisputable that the general object of the statute is to enforce a mere police regulation, and that it is purely a local State matter; that its object is to prevent fraud upon passengers going anywhere within or without the State. That does not amount to a regulation of interstate commerce. As was said in the case of *The State v. Corbett* (*supra*), "It is a mere police regulation of the sale and transfer of tickets designed to protect the public from frauds, and its interference, if any, with interstate commerce is purely incidental and accidental. The grant of power to Congress to regulate interstate commerce was not designed to and does not at all interfere with police power of the states to promote domestic order, to prevent crime and to protect the lives and property of its citizens, although such regulations may indirectly operate upon and affect interstate commerce. Such regulations are valid in spite of their operation on commerce, and the right to pass them does not originate from any power in the State to regulate commerce. The books are so full of cases to this effect that the citation of authorities in support of the proposition is unnecessary."

In our judgment, the purpose and scope of the sections of the Penal Code above referred to, are to control within the police power of the State for the protection of persons seeking transportation, the agencies within the State through which and with which contracts for transportation may be made, and that the law is free from the constitutional objections taken to it.

The order appealed from should be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order affirmed, with costs.

## JOHN F. SPAULDING and Others, Appellants, v. AMERICAN WOOD BOARD COMPANY, Respondent.

*Construction of a compromise agreement of sale as to goods delivered to a factor.*

In an action brought to enforce a factor's lien which the plaintiffs claimed to have upon goods sent to them by the defendant, it appeared that a dispute having arisen as to whether the goods had been sold to the plaintiffs outright or had been consigned to them as factors, the parties in compromise of the dispute entered into a written agreement stating, "all stock you (the plaintiffs) now have and consider consigned to be settled for by note, and we (the defendant) guarantee the price of \$50.00 per ton. Further, we (the defendant) agree to renew a portion not more than \$1,500.00 of the \$2,500.00 note already given us on account, and the June sales \* \* \* to be settled for on a cash basis; and we agree to accept customers' notes for portion and cheque for balance in full to July 1st, 1898."

*Held*, that the complaint was properly dismissed;

That the instrument operated as a transfer to the plaintiffs of the title to the goods in question, and that whatever recourse they might have against the defendant would be upon the guaranty after they had sold the goods.

APPEAL by the plaintiffs, John F. Spaulding and others, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 17th day of June, 1896, upon the decision of the court rendered after a trial at the New York Special Term dismissing the complaint upon the merits, with notice of an intention to bring up for review upon such appeal the decision and order entered in said clerk's office on the 11th day of June, 1896, directing the entry of said judgment.

*I. L. Bamberger*, for the appellants.

*Edmund Luis Mooney*, for the respondent.

PATTERSON, J.:

This action, to enforce a factor's lien, was brought, apparently, under section 1737 of the Code of Civil Procedure and the authority of *Whitman v. Horton* (46 N. Y. Super. Ct. 531; *affd.*, 94 N. Y. 644). No point has been made of the right to maintain such a suit before demand of payment of the amount of the lien made upon the owner of the chattels against which the lien is sought to be enforced, and, therefore, we do not pass upon that question.

The plaintiffs were agents for the sale of goods manufactured by the defendant. They had two accounts on their books of their dealings with the defendant; one of goods consigned directly to them, to be sold on commission, and another called the general account, which was of merchandise shipped and delivered by the defendant to customers secured by the plaintiffs, which merchandise did not pass through or come into the hands of the plaintiffs, but upon which they were entitled to receive a commission, evidently for procuring the sales to be made. The complaint alleges that when this action was begun the plaintiffs had in their possession certain goods, upon which they claimed they had made advances to the defendant; that such goods were held under an express agreement that they should be retained as security for such advances and for commissions, and on a further agreement that such goods would bring in the market the price of fifty dollars a ton, and, further, that the defendant guaranteed such goods would bring that price; that the substance of that guaranty was subsequently, and on or about July 11, 1893, embodied in a writing; that it was also agreed that, in the event of the failure of the defendant to pay such advances and commissions, it was the right of the plaintiffs to sell the goods at public auction or private sale, and to retain from the proceeds of sale the amount due them. Other facts are alleged tending to sustain the right of the plaintiffs to foreclose the lien, and appropriate relief is asked for. The answer admits the possession by the plaintiffs of the goods in question, but avers that such goods were sold to the plaintiffs and not consigned for sale, and sets up as an affirmative defense that, prior to the commencement of this action, an account was stated between the parties showing that the plaintiffs were indebted to the defendant in a certain sum of money, which has been fully paid, and that there has been a settlement and discharge of all claims and demands alleged in the complaint.

The real issue between the parties on these pleadings was the relation in which the plaintiffs stood to the merchandise upon which they claim a lien. Were the plaintiffs the purchasers of those goods or did they hold them as factors for sale on account of the defendant? The solution of that issue of fact depends upon the construction to be given to the writing of July 11, 1893, which is referred to in the complaint as containing a guaranty given by the defend-

ant, but which the defendant contends embraced the whole agreement between it and the plaintiffs with reference to the particular goods, the subject of the action. That writing is to be construed in the light of the circumstances surrounding its execution, and of the testimony given by one of the plaintiffs as to the reason and the occasion of the making of that paper. Mr. Spaulding testified that a dispute or misunderstanding had arisen as to whether the transactions referred to in that writing were sales made directly by the defendant to the plaintiffs, or whether the transactions were what were ordinarily understood to be consignments. The witness proceeded to state that the misunderstanding had arisen before the eleventh of July, and that for the purpose of settling that misunderstanding and bringing about a compromise of the differences then prevailing between the parties, he went to the factory of the defendant and there, as the result of a conference, the paper was executed, which was signed by both the plaintiffs and the defendant.

That paper recited that the "following agreement" was entered into by which the differences between the parties were adjusted, viz.: "All stock you (the plaintiffs) now have *and consider consigned* to be settled for by note, and we guarantee the price of \$50.00 per ton. Further, we (the defendant) agree to renew a portion not more than \$1,500.00 of the \$2,500.00 note already given us on account, and the June sales, including invoice of June 2d, to be settled for on a cash basis; and we agree to accept customers' notes for portion and cheque for balance in full to July 1st, 1893." The interpretation of that paper was for the court. It was an agreement of settlement of the matter in contest between the parties. That matter the witness Spaulding has stated. It was whether the sales were made directly to the plaintiffs or were consignments. It is perfectly apparent that the true construction of the paper is that the goods which the plaintiffs *considered consigned* were to be settled for by note, and the defendant was to guarantee that the goods when sold would bring the plaintiffs the price of fifty dollars a ton. We think the court below correctly construed the agreement. The contention on the part of the plaintiffs is that the writing is a mere recognition by the defendant of the plaintiffs' claim that the goods were consigned and that the guaranty was intended to protect the plaintiffs for the amount of the advances they had made to the

extent of \$1,500 of the renewal of \$2,500 given on account of the goods. But it is plain that this writing is evidence of a complete settlement for those goods. The note of the plaintiffs was to be given for the goods, and the guaranty of the price was for the protection of the plaintiffs, necessarily in some different relation than that of mere factors, for in the relation of factors the guaranty would accomplish nothing more than what the law provided, namely, a liability of the defendant for any balance that might arise by a sale of the goods for a less sum than the amount of the plaintiffs' advances upon the charges against them. The guaranty was appropriate to a sale by the defendant to the plaintiffs, so that no loss would arise by reason of their becoming the owners of the goods, and the settlement and adjustment of the controversy upon the basis of the plaintiffs becoming such owners. The reference in the writing to the June invoice merely puts that on a cash basis, or what is regarded as equivalent to that, the acceptance of customers' notes for a portion and a check for the balance. We think, therefore, that the court below was right in its conclusion that the plaintiffs became the owners by the settlement of July eleventh of the goods, and that whatever recourse they might have against the defendant would be on the guaranty, after making the sale of the goods.

It is claimed, however, that the correspondence between the parties shows a modification of the writing referred to, and that the dealings between them with reference to the goods indicate such modification, or at least are evidence of the construction which the parties themselves gave to the arrangement resulting in that writing. That the correspondence cannot control in the former aspect seems clear from the fact that the plaintiffs sue upon a contract made on or before July eleventh; the right to the lien is claimed to have arisen then and not from any subsequent arrangement. As to a practical construction having been made by the parties of the instrument of July eleventh, which would give it the meaning claimed by the plaintiffs, there is nothing in the plaintiffs' letter of August 1, 1894, and the defendant's answer to it of August 4, 1894, to justify that contention. Evidently, so far as the defendant is concerned, it only refused to sanction a sale which would render it liable upon its guaranty. The plaintiffs sought to reopen the ques-

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tion of consignment and *that* the defendant would not assent to. It said in its letter: "It is not necessary for us to restate our correspondence regarding the matter you insist upon disputing every time your note matures." Properly viewed, the plaintiffs' letter indicated a desire on the part of the plaintiffs to get the defendant committed to an acknowledgment that the goods were held on consignment notwithstanding the settlement of July eleventh, and to accomplish that, to ask permission to sell the goods at less than the fifty dollars mentioned in the guaranty. The defendant's refusal to permit that to be done does not affect the matter. The plaintiffs' right to sell was entirely independent of any permission of the defendant. They might have sold the goods for what they would bring in the market, and then have recovered the difference upon the guaranty.

The judgment of the court below was right and should be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and O'BRIEN, JJ., concurred.

Judgment affirmed, with costs.

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ISAAC SOMMERS and Others, Respondents and Appellants, v. LEON COTTENTIN and Others, Appellants and Respondents.

*Fraudulent conveyances to secure bona fide indebtednesses — to make them void, the creditors must have participated in the fraud — effect of a provision that the surplus is to be returned to the debtor; of the debtor's remaining in possession, and of the debtor and creditors being represented by the same attorneys — a wife charged with notice of her husband's fraudulent intent — presumption from there being no change of possession.*

In order that an ulterior purpose, upon the part of a debtor, who has made conveyances of and created incumbrances upon his property for the purpose of securing *bona fide* indebtednesses, to reserve to himself the control and possession of the property transferred or incumbered until the creditors so secured should enforce their rights under the instruments, shall render the transfers void, the intent must have been shared by the creditors, or those acting for them.

The fact that some of the instruments provide that, in certain events of default, the surplus arising shall be given to the debtor, and that he shall remain in



possession of the property covered by the chattel mortgages until default shall be made thereunder, does not invalidate the transfers nor impute to the creditors an assent to or complicity in the ulterior purpose of the debtor.

The fact that the attorneys for the debtor were also the attorneys for the creditors is insufficient to show knowledge upon the part of the creditors of the debtor's fraudulent intent, where it does not appear that the attorneys knew of such intent.

The wife of a debtor, to whom the debtor has transferred a portion of his property for the purpose of defrauding his creditors, is chargeable with knowledge of her husband's guilty purpose where it appears that she took no part in the transaction personally, but constituted her husband her agent in regard to the matter, and was perfectly content to let her husband do what he pleased in regard to the property.

*Seemle*, that the presumption of fraud in a sale of personalty, resulting from the fact that the possession of the articles transferred was not changed, may be rebutted by proof that the transfer was made in good faith, without any excuse being shown for there having been no change of possession of the articles under the transfer.

APPEAL by the plaintiffs, Isaac Sommers and others, from portions of, and by the defendants, Leon Cottentin and others, from the whole of, a final judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 3d day of May, 1897, upon the report of a referee, an interlocutory judgment entered in said clerk's office on the 22d day of May, 1895, upon the report of a referee, and an order entered in said clerk's office on the 13th day of April, 1897, overruling exceptions to the report of the referee appointed under the interlocutory judgment.

*G. C. Comstock*, for the plaintiffs.

*Louis Marshall*, for the defendants.

PATTERSON, J. :

These are cross-appeals, the defendants appealing from both an interlocutory and a final judgment. The cause was tried before a referee appointed to hear and determine the issues. His report was confirmed and an interlocutory judgment was entered thereon, by which certain conveyances, mortgages and transfers of property were declared to be fraudulent and void as against the plaintiffs, judgment creditors of the defendant Leon Cottentin. By such interlocutory judgment another referee was appointed to take and state an account and determine and report what property and assets

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or the proceeds thereof had come into the hands of the defendants, which should be paid over to a receiver (also appointed in such interlocutory judgment) of the property, assets and effects of Leon Cottentin, transferred or incumbered by the conveyances or transfers aforesaid. The referee named in the interlocutory judgment made his report, in which he specified what real and personal property of the defendant Leon Cottentin had passed under the conveyances and transfers declared by the interlocutory judgment to have been fraudulently made, and also found that the defendant Beadleston & Worz was accountable to the receiver for the value of personal property received by it from the defendant Leon Cottentin in the sum of \$3,250, and also for the sum of \$406.75; that the defendant Marie Cottentin was accountable to the receiver for the amount of \$3,250 and also for an additional sum of \$850; that the defendant Francois Drizal was accountable for the same sum as the defendant Marie Cottentin, but that the real property affected by the fraudulent conveyances had been sold under prior incumbrances and that no surplus was realized. Upon the coming in of the report final judgment was entered confirming it in all respects and directing the defendant Beadleston & Worz forthwith to pay over and deliver to the receiver the sum of \$3,250 and also the sum of \$406.75, with interest on both sums from August 23, 1893, and also directing the defendant Marie Cottentin forthwith to deliver to the receiver the sum of \$3,250 and an additional sum of \$850, with interest from the 24th of May, 1894, and the same direction was made with reference to payment being made by the defendant Francois Drizal. The final judgment then provided that the payment by either of the three parties should be credited to the others, and that full payment of the judgment entered against any defendant, or any part payment by any defendant against whom a judgment has been entered, should operate as a satisfaction or payment *pro tanto* of the judgment entered against such defendant, both in this action and in another action by other plaintiffs seeking the same relief against the alleged fraudulent conveyances and transfers.

The defendants appeal from the whole of the interlocutory and final judgments. The plaintiffs excepted to so much of the report of the referee on the trial of the issues as directed costs to be paid out of the moneys recovered from the defendants, and insisted that

such costs should be paid by the defendants personally. The plaintiffs also excepted to portions of the decision of the referee appointed under the interlocutory judgment which affected the amounts to be paid by the defendants respectively, and insist that the defendant Beadleston & Worz should be chargeable with all amounts, the proceeds of the transferred property. The defendant Ditmar and the defendants Cottentin and the defendant Drizal in their notice of appeal from the final judgment gave notice of their intention to bring up for review the interlocutory judgment.

The action was brought to have declared fraudulent and void and to set aside a number of conveyances of realty, mortgages, chattel mortgages and transfers of personal property, all of which property prior to the 5th of August, 1893, belonged to the defendant Leon Cottentin. The property affected consisted in part of real estate in New Jersey, upon which were then outstanding large incumbrances, also a restaurant in the city of New York and its appointments, including a stock of wines, liquors, supplies and other merchandise used in the business. Leon Cottentin also at that time had certain contracts for furnishing meals to the employees of large corporations having their offices in the city of New York. On the day mentioned and previously, in the conduct of his business in the New York restaurant and in supplying food under the contracts referred to, he was assisted by his wife, his daughter, the defendant Drizal, and he also employed a number of servants in the conduct of his business in the restaurant. Finding on the day mentioned that the restaurant enterprise in which he had invested large sums of money was not successful, and that he was financially embarrassed and unable to pay his debts, he desired to make provision for securing certain of his creditors to the exclusion of others. Thereupon he sought the advice of a firm of reputable lawyers, who at the same time happened to be the legal advisers of some, if not all, of the creditors he wished to protect. As a result of his conferences with his counsel, a deed of trust was made by Leon Cottentin to the defendant Ditmar, who was a clerk in the office of the attorneys referred to, and by that deed of trust certain property at Long Branch, in New Jersey, was conveyed to the trustee to secure eight creditors named for indebtedness actually due them—including an indebtedness of \$2,782, to the defendant Beadleston & Worz, a New York

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corporation. In addition to the debt of Beadleston & Worz, thus secured by the mortgage on the New Jersey property, there was another indebtedness of Leon Cottentin to that corporation, amounting to \$5,000. The latter indebtedness is that which gives rise to the most important question in the case. At the same time at which this trust deed was made Leon Cottentin executed and delivered to Ditmar, as trustee, a mortgage, which covered the lease of the restaurant premises in the city of New York, and the fixtures therein. Two days before he had executed a mortgage to his wife upon the lease and chattels in the restaurant, to secure her debt of \$5,220. This mortgage to the wife ranked in advance of the trust mortgage for the benefit of the creditors named in the trust deed. Mrs. Cottentin did not join in the deed of the New Jersey property, so that her dower therein was not affected thereby. In some of the instruments there was a provision for paying surplus realized on sales of the property to Cottentin. The instruments thus far referred to did not cover all the property belonging to Leon Cottentin. He had remaining the stock of liquors and wines and supplies, to which reference has been made. That merchandise was supposed to be worth in the aggregate, at a rough valuation, about \$5,000. Cottentin owed that amount to Beadleston & Worz, in addition to the sum mentioned in the deed of trust. Cottentin disposed of this merchandise and all the chattels, furniture and fixtures, by transferring them by a bill of sale to Beadleston & Worz. The chattels, furniture and fixtures were transferred subject to the mortgage of Mrs. Cottentin. The bill of sale from Cottentin to Beadleston & Worz was dated August 3, 1893. On August 5, 1893, Beadleston & Worz made a bill of sale of this same property, subject to the same mortgage, to N. P. Abbott, one of its employees. An inspection of this stock of merchandise was made by an agent of Beadleston & Worz before the transfer was made, and its value was fixed at \$5,000. When the property was transferred the \$5,000 indebtedness to Beadleston & Worz was actually canceled. It had existed in the shape of a promissory note, and it was agreed that that note should be surrendered when the transfer of the personal property was made; at least, instructions were given to the attorney at law to make the surrender. Abbott took formal possession of the property; the restaurant business was continued; there was a sym-

bolical delivery of the restaurant to Abbott by turning over the keys to him, the liquor tax certificate was transferred to him, but thereafter Leon Cottentin did actually stay upon the premises and manage the business of the restaurant with substantially the same assistants and in substantially the same manner as before. Nevertheless, Abbott supervised the business, employed Cottentin at a salary of thirty-five dollars a week, which, however, Cottentin paid himself by drawing a few dollars at a time, as occasion required, but the profits of the business, after the transfer to Beadleston & Worz, and until the retransfer, presently to be mentioned, were taken by Abbott for Beadleston & Worz, and are charged against Beadleston & Worz by the referee before whom the issues were tried. Meantime a change had also taken place with reference to the contracts Cottentin had to furnish meals or food to the employees of the several corporations above referred to. All that business had passed into the hands of Mrs. Cottentin and Drizal. There was no specific written transfer of these contracts made, but nominally, at least, that business passed out of the hands of Cottentin as the contractor to furnish meals; which were, however, furnished from the restaurant. The relations of Beadleston & Worz or Abbott to the restaurant, the fixtures and the stock of merchandise continued until August 23, 1893, when it was ascertained that Pottberg, the agent of Beadleston & Worz, who made the original appraisal of the merchandise, had put an excessive estimate of value upon it, and thereupon negotiations were had which eventuated in a rescission of the sale and transfer, and the reinstatement of the parties to that bill of sale and transfer in the position they occupied before it was made. Beadleston & Worz retransferred all that it had acquired by that transaction to Leon Cottentin. The debt to Beadleston & Worz was revived, a new note for the amount was given, and by a consent of the other beneficiaries under the trust deed to Ditmar, Beadleston & Worz were allowed to come in and be secured by that trust deed for the \$5,000 note thus given. As an inducement to the creditors to allow this to be done, Mrs. Cottentin released her dower in the real estate in New Jersey. Thereupon Beadleston & Worz seem to have withdrawn from all further connection with the matter. Mrs. Cottentin and Drizal then entered into an arrangement for carrying on the restaurant business and Leon Cottentin transferred to them his interest,

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whatever it may have been, in the restaurant and its equipment, but continued as the manager of the business. All these transfers were made before the plaintiffs in this action recovered their judgments, but the debts to them were due and owing from before the 3d of August, 1893.

The foregoing are the material facts to be considered. It is charged in the complaint that all these transfers and transactions were made with a fraudulent intent and purpose; that the defendant Leon Cottentin, being wholly insolvent on the 5th of August, 1893, and the other defendants knowing that he was thus wholly insolvent, entered with them into a scheme, having for its object the conveyance to them of everything of which he was possessed, in such manner and with such effect that his debts to them should be secured out of the property conveyed, in preference to the claims of other creditors, and that in the meantime the property so conveyed should continue in the possession and control and management of the defendant Leon Cottentin and to his use, so that such property might not be seized or taken on execution or process against the said Leon Cottentin by other creditors, and so that the payment of the indebtedness of the other creditors might be hindered and delayed until such time as the defendant Leon Cottentin might be able to pay or compromise or otherwise settle his indebtedness with such unsecured and unprotected creditors. These averments of the complaint charge actual fraud and conspiracy. The referee before whom the issues were tried did not find that a specific agreement was made between the parties with the object or looking to the purpose set forth in these averments of the complaint, but he did find that an unlawful scheme was entered into by all the defendants prior to the making of the alleged transfers, with the intent that the defendant Leon Cottentin should convey to the other defendants all, or substantially all, of his property to secure their claims in preference to the claims of other creditors, including the plaintiffs, and "that at the same time the said property so transferred should remain in the possession of, under the control and management of, the defendant Leon Cottentin, and to his future use, and should not be seized upon or taken by any of the other creditors, including the plaintiffs, of the defendant Leon Cottentin by virtue of any process or processes issued at their instance, and with the intent that

the payment of such other claims and of such other creditors might be unduly hindered and delayed." That referee also decided that the defendant or defendants to whom such alleged transfers are stated in the complaint to have been made, aided in the scheme and participated in such intent. The referee thus found upon the evidence the elements necessary in law to avoid these instruments. He expressly found mutuality in the design of hindering and delaying creditors, but he also found that every indebtedness secured by all or either of the conveyances, mortgages or transfers attacked, was a subsisting, valid, enforceable indebtedness; that is to say, he found that when the alleged scheme was entered into, the defendant Leon Cottentin was indebted to the eight creditors named in the trust deed to Ditmar, and he also found that on August 5, 1893, the defendant Leon Cottentin was indebted to his wife, the defendant Marie A. Cottentin, in the sum of \$5,220. We have, then, to start with in the examination of the case, the fact which the referee properly found—that all the creditors secured or sought to be secured by the instruments impeached in this action were *bona fide* creditors. It is not claimed that Leon Cottentin could not lawfully prefer all or either of them by making transfers of, or incumbrances upon, or by the delivery of, specific property, either in payment or as security for their debts; nor is it claimed that any delay or hindrance which other creditors would be subjected to by reason of such conveyances, incumbrances or transfers, would render them *ipso facto* void; nor is it contended that an ulterior purpose or intent of Leon Cottentin to secure to himself the control and possession of the property transferred or incumbered until the creditors preferred should resort to the enforcement of their rights under the instruments, would of itself invalidate those instruments, unless it be the chattel mortgage to Ditmar as trustee. It is conceded that that intent must have been shared in in this particular case by the creditors or those acting for them, because the creditors took for value. We are not informed of the legal ground upon which the learned trial referee based his decision, except so far as it was founded upon his understanding of the evidence as establishing some scheme or arrangement entered into, looking beyond the mere security of the creditors and having for its ultimate object the retention of the property and business in the hands of the debtor Cottentin, safe from the

pursuit of other creditors. It would seem that the decision must have been based upon inferences drawn from the general history of the whole transaction and the circumstances of the case. If it were, the inferences were not justified. There is no proof whatever from the beginning to the end of this record, of any agreement entered into between the preferred creditors and Cottentin to give him any advantage or accommodation by way of delay or otherwise out of these various transactions. It is shown, however, that Cottentin himself was looking to such advantage, expected it, and entered into the arrangement with the intention of securing it. That is shown by the testimony of four witnesses, and also by the letter written by one of the plaintiffs and certified to by Cottentin as being "entirely correct." But his intent is not controlling. These were not voluntary conveyances, that is, not without present consideration. Each one of the creditors secured had a perfect right to receive that security and Cottentin also had the right to grant it. But if these creditors did not receive the transfers in good faith, if they became parties in any way to his purpose of maintaining possession and control and the use to his own benefit of the property to gain time and keep off his unsecured creditors, then they became parties to the purpose in such a way as to make the conveyance fraudulent and to require that they be set aside by the court.

In this connection it is proper to state that nothing is to be inferred against the lawful character of the transfers and instruments, and nothing is to be imputed to the preferred creditors by way of assent to or complicity in any ulterior purpose of Leon Cottentin, from the mere fact that some of the instruments provided that, in certain events of default, the surplus arising should be given to Cottentin or that he should remain in possession under the chattel mortgages until default was made thereon. When the case was before the learned trial referee, he might have been justified in basing his decision upon the provisions of the instruments referred to, for it had been expressly decided in *Delaney v. Valentine* (80 Hun, 476) that such a mortgage as that made to Ditmar was invalid, because it contained a resulting trust in favor of the mortgagor arising from the provision that the overplus should be returned to the mortgagor. That ruling was, however, reversed, and the contrary



doctrine announced by the Court of Appeals on an appeal to that tribunal in the same case, the decision of that court having been announced since these appeals were argued at the bar of this court (154 N. Y. 692). This consideration applies to the mortgage on chattels in the Cortlandt street premises, and is of importance only with reference to that feature of the case. Upon considering all the evidence with reference to the general finding of the trial referee, that all the transfers and all the instruments sought to be impeached here were fraudulent because of a participation of the creditors preferred in the unlawful intent of Leon Cottentin, we discover nothing to justify that finding in any relation which any individual creditor thus preferred had to the subject. It is not shown that any one of them had any participation in any negotiations resulting in those conveyances, the only exception being that, in the matter of the claim of Beadleston & Worz upon the \$5,000 note, during parts of the transaction, they were represented by Pottsberg or Abbott. The only circumstance from which knowledge of any ulterior intent on Cottentin's part can be inferred is, that the same lawyers represented both the creditors and Cottentin in the whole transaction, and that Ditmar, who was selected as trustee, was a clerk in the office of those lawyers. It is not to be denied that knowledge or notice to the agent of creditors thus preferred would be imputed as knowledge or notice to themselves, but there is nothing on the whole record to show that the attorneys, or Ditmar, actually knew of any such ulterior purpose. Ditmar swears that he did not, and there is no proof, even inferentially, that the attorneys did. The transactions themselves were not of such a character as would necessarily have compelled these attorneys to know that Cottentin had in mind something more than to secure his creditors in a lawful and proper way. That embarrassment would arise and suspicion be excited from the fact that the same attorneys represented both parties to transactions of this character, may be true, but it seems to be apparent from this whole record that each one of the transactions being in itself entirely lawful there was no good reason why the attorneys could not act for both parties, for the direct object to be accomplished was the security of certain creditors who were entitled to take the security precisely as they did; and had they been represented by other attorneys no question

could possibly have arisen of notice or knowledge imputable to them by reason of the connection of their legal advisers with the matter.

On the facts of the case we do not think that any inference of fraudulent intent can be drawn to affect these preferred creditors in the whole series of instruments sought to be set aside. But, leaving the general aspect of the case, we come to the practically more important matter, of the relations of Beadleston & Worz to the transaction, the instruments executed in their favor and that subsequently made by them, and their attitude to the case with reference to the personal property embraced in the bill of sale to them, executed on August 3, 1893.

This transaction is separated from the general subject because the practical result of the litigation has been to charge Beadleston & Worz and Mrs. Cottentin and Drizal with liability and the entry of a money judgment for the value of the merchandise embraced in the bill of sale. The theory of the plaintiffs with respect to this independent transaction is that, from the time of the delivery of the bill of sale down to the final transfer to Mrs. Cottentin and Drizal, there was one distinctly traceable purpose of putting that merchandise and the restaurant business in such a shape that unprotected creditors of Cottentin could not reach it, and, if the proofs support that contention, the judgment charging these defendants with liability was right.

The series of transfers certainly begins with record relations established between Leon Cottentin, Mrs. Cottentin and Beadleston & Worz, and the last of the record relations effected by the instruments are also between the same parties, for, in the consideration of the independent transactions in which Beadleston & Worz were interested, we regard Abbott as being only an agent of that corporation. The bill of sale to Beadleston & Worz was dated the 3d of August, 1893; the mortgage of Leon Cottentin to his wife upon the lease of the premises in Cortlandt street, where the restaurant business was carried on, was of the same date. There was a consideration for each of those instruments. There can be no doubt of the \$5,000 indebtedness of Cottentin to Beadleston & Worz, nor can there be any doubt of Cottentin's indebtedness to his wife. What proof is there of any complicity or intention of

Beadleston & Worz to enter into a mere sham transaction with reference to this merchandise, or to enter into complicity with Cottentin to take a mere formal transfer of this property so that it might be preserved from the pursuit of other creditors of Cottentin? There was a valuable consideration for the bill of sale (*Seymour v. Wilson*, 19 N. Y. 420; *Murphy v. Briggs*, 89 id. 450); and if the Beadleston & Worz Company acted in good faith, and merely for the purpose of securing the satisfaction and payment of their debt, a good title was acquired. What was done by it? It had an appraisement made of the value of the stock in trade; procured the liquor tax license to be assigned by proper authority to it; put a man in possession, to whom it transferred its interest, to be held for it. The general supervision of the restaurant business was taken by that man; the net profits accruing from the business from August third to August twenty-third were received by him alone. All these circumstances indicate a *bona fide* transaction; not one of them indicates anything else. The only incident that could give them another complexion is the association of the bill of sale with the other transfers and conveyances by which Cottentin disposed of his interests in all the property he possessed, and the fact that twenty days after August third all of the transactions with reference to the bill of sale were undone and the restaurant, fixtures and chattels retransferred to Leon Cottentin. But a reason for that is given, namely, that upon a more careful examination of the articles transferred by the bill of sale of August 3, 1893, it was ascertained that they were very much less in value than the sum at which they had been taken by Beadleston & Worz. When the bill of sale of August third was made there was a complete relinquishment by Beadleston & Worz of the claim upon the \$5,000 note; they had taken the bill of sale in satisfaction of that indebtedness. There is nothing in the evidence to indicate that this was a mere pretense or sham, and when the retransfer was made on August 23, 1893, the original indebtedness was restored and other security was provided for it, namely, the admission of Beadleston & Worz's claim thus re-established into the Ditmar trust and the putting into that trust, so to speak, of the dower interest of Mrs. Cottentin in the New Jersey property. We cannot find upon the evidence that these transactions from the third to the twenty-third of August were merely

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or partly devices to aid Cottentin in keeping the property in his own hands so that he would be unmolested by other creditors. On the face of the transaction it seems to be reasonable that Beadleston & Worz was attempting honestly to secure its own claim and nothing beyond that. If it had shared in the intent imputed to it, it would have continued to hold the stock of goods under its bill of sale, or in the name of Abbott, instead of retransferring it on the twenty-third of August. The very transaction itself seems to indicate its good faith. But it is claimed that the fraudulent character of the transaction is to be inferred as matter of law from the fact that Cottentin retained possession of the restaurant; that is to say, of the premises upon which the business was carried on, and in which this personal property was located. It is not to be controverted that Cottentin did remain on the premises, apparently in the same position and with the same relation to the business and the property he had occupied before the bill of sale was made on August third. The retention of possession is sometimes not only a badge of fraud, but raises a presumption of fraud against creditors. But that question of fraud under the statute is one of fact, and it arises when the vendee is required to show a valid excuse for leaving the property in the vendor's possession. Finding, as we do, that the sale was not fraudulent, but was honest, it may not be necessary to consider this question of the change of possession at all. (2 R. S. 136, § 5.) It was held in *Hanford v. Artcher* (4 Hill, 285), referring to the case of *Smith & Hoe v. Acker* (23 Wend. 653), that a party claiming under a sale or mortgage of personal property, not accompanied with a complete change of possession, may rebut the presumption of fraud arising from want of delivery and change of possession, by proving that the transaction was in good faith and without any intent to defraud creditors; *not* by showing some excuse or reason why there had not been a change of possession, but by proper and relevant testimony to show the real *bona fides* of the transaction. And in *Mitchell v. West* (55 N. Y. 107) it was held by the Court of Appeals that the case of *Hanford v. Artcher* (*supra*) settled that point. But even if it became necessary in this case to furnish a valid excuse for Cottentin still being in apparent possession, it is to be found in the evidence on this record, namely, that Beadleston & Worz, through Abbott, took

possession so far as it could, without destroying the business of which it became the proprietors; that it put Cottentin in charge as manager, and paid him a salary; that it took the proceeds of the business and held that business for the period of twenty days, and until it became satisfied that it was to its interest, regardless of Cottentin, to surrender it back to him for the consideration of being restored to the position it occupied before it took the bill of sale, and its participation in the Ditmar trust.

We think, therefore, that in either aspect of this subject of possession, the defendant Beadleston & Worz has shown its innocent relation to the subject.

There remains for consideration the attitude in which Mrs. Cottentin and Drizal stand to the matters involved in this action. Was the transfer by Cottentin to them, which succeeded the retransfer to him from Beadleston & Worz, made by the parties thereto with intent to hinder and delay creditors? Mrs. Cottentin seems to have had nothing whatever to do personally with this transaction. It was all left to her husband. At the time at which that transfer was made she left the city of New York to go to Chicago, and really constituted her husband her agent for all the purposes of that transaction. Drizal seems to have had only a nominal interest in the matter, and it is perfectly clear upon the whole record that this transfer was nothing but a step in carrying out the purposes of Cottentin to keep this property in his possession, subject to the incumbrances upon it, as long as he could. We have already seen that none of the creditors secured can be fairly chargeable with knowledge or of complicity in that purpose of his. But the conclusion seems to be irresistible that Mrs. Cottentin was perfectly content to let her husband do whatever he pleased with the property, and she is chargeable with notice of his intention and of his purpose.

We are, therefore, of the opinion that the judgments should be reversed as to the defendants Beadleston & Worz and Ditmar, and a new trial ordered as to those defendants before another referee, with costs to the appellant Beadleston & Worz to abide the event, and that the judgments should be affirmed so far as the bill of sale and transfer of the merchandise and stock of goods from Cottentin to his wife and Drizal is concerned, with costs to the plaintiffs, to be paid by the defendants Cottentin and Drizal. The plaintiffs'

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appeal from the order respecting costs should prevail to that extent. In the view we have taken of the merits of the case and of the *bona fides* of the transactions, it is unnecessary to consider any of the other questions arising upon either appeal.

VAN BRUNT, P. J., O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgments reversed as to defendants Beadleston & Worz and Ditmar, and new trial ordered as to them before another referee, with costs to appellants to abide event; and judgments affirmed, so far as the bill of sale and transfer of the merchandise and stock of goods from Cottentin to his wife and Drizal is concerned, with costs to plaintiffs, to be paid by defendants Cottentin and Drizal.

ADAMANT MANUFACTURING COMPANY OF AMERICA, Respondent, v.  
LEWIS Z. BACH, Appellant, Impleaded with H. P. BINSWANGER  
COMPANY.

*Contract to plaster a "seven-story building, \* \* \* according to plans furnished," construed.*

A contract to plaster "your seven-story building, \* \* \* according to plans furnished us by your architect," is to be construed as a contract not to plaster all of the "seven-story building," but to plaster it "according to plans furnished;" and the contract not being formal and no specifications having been furnished, it is competent upon the trial of an issue as to whether the contract embraced the plastering of the basement and bulkhead of the building, to show what was said between the parties in regard to the portions of the building to be plastered.

In such a case it is not improper to exclude evidence of the custom of the building trade as to what is included in the expression a "seven-story building."

BARRETT, J., dissented.

APPEAL by the defendant, Lewis Z. Bach, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of July, 1897, upon the decision of the court rendered after a trial at the New York Special Term in an action brought to foreclose a mechanic's lien.

The lien was filed by the plaintiff for work and materials furnished under contract with the defendant Bach, the owner of an apartment house at Park avenue and Eighty-first street in the city of New

York. The contract was an informal one, consisting of a letter written by the plaintiff and accepted by the defendant Bach, by which the former agreed that it would "plaster with adamant wall plaster your seven-story building at Park Ave. and 81st street, according to plans furnished us by your architect, \* \* \* for for the sum of five thousand dollars (\$5,000)."

The plaintiff alleged and sought to prove a full and complete performance. The defendants, on the other hand, insisted that the plaintiff had omitted to plaster the basement and the bulkhead of the building, and that a large portion of the work performed was done in an unworkmanlike and unskillful manner. The reasonable value of plastering the bulkhead was \$20, and of plastering the basement was from \$350 to \$400. The court found that the plaintiff performed its contract, and that it did not contract to plaster either the basement or the bulkhead.

*Frank Avery*, for the appellant.

*Edward C. Perkins*, for the respondent.

O'BRIEN, J. :

The points presented by the appellant are: (1) That the court erred in holding that under the contract the plaintiff was not required to plaster the basement and bulkhead; (2) that, by reason of the omission to plaster those parts of the house, the plaintiff failed to prove a substantial performance, and (3) exceptions to rulings made excluding evidence of usage or custom in the building business in regard to plastering the basement and bulkhead in a seven-story apartment house.

The contract was to plaster "your seven-story building \* \* \* according to plans furnished us by your architect," and the crucial question litigated upon the trial and to be disposed of on this appeal is as to what plans, if any, were furnished by the architect, and whether, in the plans so furnished, the basement and bulkhead were included. Were it not for the language in reference to the furnishing of plans, we should be inclined to adopt the appellant's construction that the words "seven-story building" were intended to designate the building to be plastered, and not to specify or limit the extent of plaster to be used in the building, and that under such

agreement the plaintiff was obliged to do all the plastering necessary and proper to complete this particular building. But this, as we have pointed out, was modified and limited by the statement that the work was to be according to plans furnished, from which we are to infer that plans were furnished, and the point to be determined is, what did the plans, if furnished, call for?

The testimony on both sides showed that, at the time the contract was made, only one plan had been delivered to the plaintiff by the defendant or the defendant's architect, and a blue print of this plan appears in the appeal book, marked Exhibit A, and entitled, "2-3-4-5-6-7 stories." The architect, Knubel, testified that he showed the plaintiff's employee, Strang, a full set of plans, including a plan of the basement, but he does not claim that any such plans were ever furnished; so we are relegated to what occurred between Knubel and Strang, who was the one in the first instance representing the plaintiff and who had the conversation with the architect as to what the contract for plastering was to embrace.

On the one side we have the fact that the plan furnished did not include the basement or bulkhead, and, in fact, did not include the first story; but this latter was done by the plaintiff, presumably as the result of agreement, there being no disposition shown on the part of the plaintiff, so far as we can find from the record, to do any more than it was required by its contract. The plaintiff's claim being that the plans given to Strang or to the plaintiff's manager, Goddard, were the only set of plans that was actually furnished them, and having in view in addition the testimony of the architect that he showed them a set of plans which included the first floor and also the basement, we have, then, a conflict arising — because it is conceded that the plaintiff understood that it was to plaster and actually did plaster the first story — as to how much of the plastering appearing on the full set of plans the plaintiff was to do. Strang's version of the interview is as follows: "I said to Mr. Knubel, 'What about the basement?' Mr. Knubel answered me, 'There will be no plastering in the basement.' I then took the plan with me. There was no bulkhead ever mentioned to me at any time, either then or ever afterward. I gave that plan to Mr. Goddard."



The architect's testimony is that, upon showing Strang the full plans, including the basement, and offering to give them to him, he said it was unnecessary for him to take them as one plan was sufficient ; and the architect admits that Strang was particular to know just what there was in the basement, and that he made the one plan showing the stories other than the first one and the basement, which Strang took away, but states with reference to what portion of the basement was to be plastered that he told Strang the entire ceiling was to be done. It appears, however, that Mr. Goddard, the plaintiff's manager, who made the contract, testified that he figured his estimates from the plan furnished him, Exhibit A, and that he never saw the building before the signing of the contract, and, with respect to the bulkhead, we find an equal conflict between the testimony of the architect and Strang as to what was said about plastering it.

Taking the letter, therefore, which constituted the contract, it cannot be said as matter of law that it calls for the plastering of the bulkhead and basement, because it was not to plaster the building, but, as already pointed out, to plaster it "according to plans furnished us by your architect." Thus the question turned upon what was said between the parties in regard to the portions of the building in dispute. We do not think that this conflict so clearly preponderated in the defendant's favor that we would be justified in reversing the judgment on the grounds that the conclusion reached by the trial judge was against the weight of evidence.

Nor do we think it was error to exclude the evidence offered as to the custom in the building trade respecting what was included in the expression "a seven-story building." These questions were directed to eliciting what, according to the custom of the trade, is meant by "a seven-story building," but the contract in addition stated that the work was to be done "according to plans furnished," and it certainly was not proper to omit this latter, which was an essential part of the agreement, because it would be an attempt to vary what was written by taking the expression "seven-story building" away from the connection in which it was used and the modification attached to it. Besides, the contract not being formal and no specifications having been furnished, and, therefore, it not being in itself complete, both sides conceded that it was open to oral explanation as to just what was meant by the parties to the contract.

As to this there was a clean cut question whether or not the basement and bulkhead were included in the plans furnished. It, therefore, would not depend on what was the meaning of a seven-story building according to the custom or usage of the trade, but upon what the work was which the plaintiff agreed to do pursuant to the plans furnished. We think, therefore, that it was not error to exclude such evidence.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY and PATTERSON, JJ., concurred; BARRETT, J., dissented.

BARRETT, J. (dissenting):

I am unable to agree with Mr. Justice O'BRIEN in this case. The contract was to "plaster — your seven-story building — according to plans furnished us by your architect," etc. The words, "we will plaster your seven-story building," must, standing alone, be held to include the work on the basement and bulkhead. Either these words of themselves import an agreement to plaster the building throughout, or else to plaster it in the usual manner, that is, to put plaster wherever it properly belonged. If the former, then the plaintiff failed to perform his contract. If the latter, then it was reversible error to exclude the defendant's evidence of the custom.

Hence the only question to be considered is the effect of the following words, "according to plans furnished us by your architect." Their meaning seems clear. They relate to the details of the work, not to the *quantum*. "According" does not mean "to the extent that." The plans were to guide and assist the plaintiff, either in plastering the building throughout, or in plastering it in the usual manner. If any existing feature of the work was omitted from the plans furnished, the plaintiff should, if it desired them, have requested additional ones. It did not, because of any omission in the plans, become absolved from performing in full. This is made clear if we paraphrase the first words of the agreement standing alone, according to their conceded meaning. Thus let us assume that the letter had read: "We will plaster the seven stories and basement of your building in the usual manner, according to plans furnished us by your architect." Could it be plausibly contended, in

such a case, that the architect's failure to deliver full plans absolved the plaintiff from full performance? Clearly not.

The plaintiff's contention leads to serious difficulties, which are illustrated in Mr. Justice O'BRIEN's opinion. Suppose the architect had offered the plaintiff full plans, but the latter did not choose to accept them, saying it did not need them. What then? Could the plaintiff thus escape the consequences of non-performance? Such an idea shocks the moral sense. Hence a somewhat more equitable ground is taken, and it is said that the plaintiff was only absolved from doing that part of the work which the architect said need not be done and for which, therefore, he furnished no plans. There was, in fact, an issue on this head as to what the architect actually said and did. But this issue resulted solely from an unwarrantable construction of the contract. That construction distorts the contract so as practically to make a new one, turning it into an agreement to do that portion of the work upon which the architect and the plaintiff's representative had mutually agreed, or upon which they should agree. The defendant, however, made his own contract. He did not leave it to the architect, and there is no proof of the latter's authority to bind him in any such manner.

The true construction of the contract is fortified by an additional circumstance which is quite controlling. The plans furnished did not include the first story any more than the basement, yet the plaintiff did the work thereon. Mr. Justice O'BRIEN accounts for this by the suggestion that, as the plaintiff evinced no eleemosynary spirit, some undisclosed agreement to plaster the first story must be presumed. It would be a strange rule that the plaintiff, by its action or non-action, could create its own presumptions — a presumption that it agreed in some way to do what it did, but that it could not have agreed to do what it did not. The fact is, that the only agreement, express or implied, of which there is any pretense, is that contained in the letter of September 10, 1895; and the plaintiff's act is a clear admission that the construction necessary to support his judgment is not the correct one. The doctrine of practical construction of a contract is plainly controlling against him.

I think the judgment should be reversed and a new trial ordered.

Judgment affirmed, with costs.

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EMMA B. YOUNG, Respondent, v. RICHARD K. FOX, Appellant.

*Libel — a justification must be as broad as the libel — charges made against a married woman — malice — evidence in mitigation cannot reduce compensatory damages — what erroneous charge is insufficient for a reversal.*

A justification must be as broad as the libelous charge, and where the publisher fails to prove many material details of it, the justification is insufficient.

An article, published of a married woman and illustrated with pictures, in which, although she is described as the victim of a plot concocted by her husband to procure evidence available for a divorce, it is falsely charged that she went voluntarily with another man into a hotel bedroom and, after having remained there some time, went with him into the hotel restaurant; that she returned to and remained with him in the bedroom two hours, during which time wine was served: that about midnight her enraged husband broke the door in and found her reclining upon a bed, and that her alleged paramour escaped in his shirt sleeves, is libelous *per se*.

Malice may be inferred and punitive damages be awarded where a libel is recklessly published as well as where its publication is induced by personal ill-will; and the fact that a weekly newspaper circulates, in advance of publication, "dodgers" or circulars, calling local attention to the fact that an outcoming issue will contain an article relative to a woman which is libelous *per se*, is some evidence that the publication was deliberate, and that an opportunity had been afforded for making an inquiry as to the truth of the account about to be published.

Evidence in mitigation extends only to punitive, and has no bearing upon compensatory, damages.

A verdict will not be set aside merely because the court, in its charge, said to the jury that the publisher admitted that he had caused a certain circular or "dodger" to be "widely" circulated, when his admission was in fact that it was circulated, unless the attention of the court is specifically called to its improper use of the word "widely."

APPEAL by the defendant, Richard K. Fox, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of May, 1897, upon the verdict of a jury for \$25,000; also from an order entered in said clerk's office on the 5th day of May, 1897, denying the defendant's motion for a new trial made upon the minutes, and also from an order entered in said clerk's office on the 4th day of May, 1897, granting the plaintiff an extra allowance of \$500.

On or about the 30th day of October, 1889, there was published in a weekly periodical, called the *National Police Gazette*, then

owned and controlled by the defendant, the following, purporting to be a true account of an occurrence said to have taken place at the Hamilton House, a hotel in Paterson, N. J., a few days prior thereto :

“WAS IT A VILE PLOT?

“A MIDNIGHT SURPRISE PARTY IN A PATERSON, N. J., HOTEL.

“A DOOR-SMASHING SEANCE.

“[Subject of Illustration.]

“Mrs. Richard D. Young, of Montclair, N. J., is a very much abused woman — or the opposite.

“Two men recently entered the Hamilton House in Paterson, N. J., the largest hotel there, and registered as John W. Allen and F. Morrey, of New York. Allen appeared to be laboring under much mental excitement. At 5 o'clock a handsome equipage drove up to the hotel and a man and woman, both fashionably attired, alighted. They registered as William Allen and wife, of Montclair. They were assigned to room 20, which adjoins the one occupied by the first-named guests. They soon came down and had supper. John W. Allen and Morrey kept their room.

“About 10 o'clock the man and woman retired to their rooms. Two hours later loud voices were heard in the hall, followed by the crash of a door. A woman's screams followed, and then all was confusion. The man who had registered as William Allen, partly dressed, rushed down stairs, leaving his valise behind, and hastily summoning his carriage, drove rapidly away.

“The woman was the wife of John Allen. According to the woman's story, John Allen is not her husband's name, but Richard D. Young, who assumed the name of Allen to gain his ends. Mrs. Young had been separated from her husband for some time past. A couple of weeks ago a young man, giving his name as Melano C. Richardt, applied for board at Mrs. Young's mother's house, where Mrs. Young had been stopping since her separation from her husband. He was accommodated and appeared to be very agreeable. On the day that the scene occurred in the Hamilton House, he asked Mrs. Young to take a drive with him. She consented, and the two

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started for Hackensack, with the results mentioned above. The lady's side of the story is as follows :

"Richardt pretended to lose the road and drove on and on, finally stopping at a hotel. It was the Hamilton House, in Paterson. He insisted on her going in for supper. His whole demeanor had changed. The more she begged to be driven home the more he insisted. They went into the restaurant and he ordered oysters. The waiter must have been his tool, for the service was so wretched that they left the table and went to the parlor, where Richardt ordered a bottle of champagne to be brought. They refused to serve it in the parlor. Mrs. Young begged to be taken home, but Richardt said she should not go a step until the wine had been drunk. They must go to a sitting room up stairs.

"Mrs. Young, unwilling to create a scene, went up with him. He opened a door and she started back. There was a bed in the room. Richardt explained that it was a country hotel, and that things were not arranged as in the city. Behind them was the waiter with the champagne. They entered. The wires of the bottle were already cut. The cork came out without noise. Mrs. Young drank a glassful of the stuff. Richardt put his feet on the foot of the bed and exclaimed loudly :

" 'This is the happiest day of my life!'

"Mrs. Young became suddenly ill, and Richardt induced her to lie down, and before she was aware of his intentions, turned out the gas. At that instant Young and his friend smashed in the door and entered, Young exclaiming exultingly :

" 'Now, at last, I've caught you!'

"Mrs. Young saw through the plot. Her strength returned and there was a terrible scene. Richardt disappeared, and she forced her husband to drive her home to Montclair, though at first he insisted on holding her there a prisoner. Before going he paid Richardt's bill."

In the same paper containing this account, upon the last and outside page, were certain drawings or sketches purporting to picture certain of the incidents described in the printed article. Across the front of the title page of this periodical were printed the words :

"Fun in a Paterson, N. J., Hotel."

At the date of the publication the plaintiff was living, and for

some time prior thereto had lived, in the town of Montclair, N. J., with her mother and her children, separate and apart from her husband, one Richard D. Young. Prior to the appearance of the number of the *National Police Gazette* containing the article and pictures referred to, the defendant caused to be distributed in Montclair, where the plaintiff resided, a circular or "dodger" calling the attention of the public to the edition of his paper which would be out on Wednesday, October 30, 1889.

The purpose of this action was to recover damages claimed to have been suffered by the plaintiff by reason of the publications alleged in the complaint to be false, scandalous and libelous. The defense was that the publication complained of was a fair and true report of the facts in connection with the plaintiff's visit to the hotel in Paterson, N. J., at the time mentioned, and that the article was not published maliciously, or with any intent to injure the plaintiff, but was published by the defendant as a matter of news and general interest to the public in the belief that the same was true.

At the close of the plaintiff's case, and again at the close of the entire case, motions were made to dismiss the complaint, which were denied, to both of which denials exceptions were taken, and, the matter having been submitted, under the judge's charge, to the jury, they returned a verdict in the plaintiff's favor, and it is from the judgment entered thereupon that this appeal is taken.

*Benjamin F. Tracy*, for the appellant.

*Jno. J. Adams*, for the respondent.

O'BRIEN, J.:

Although many grounds are urged for a reversal of the judgment, the principal ones are (1) that the justification pleaded by the defendant was proved in every essential particular; (2) that the court erred in charging the jury that the defendant's publication was libelous *per se*, and (3) that the court erred in its charge to the jury upon the subject of punitive damages.

It was made to appear that many of the incidents related in the article actually occurred. It is conceded that, on the day in question, the plaintiff with a young man named Richardt left Montclair, N. J., some time about five o'clock in the afternoon and drove to

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Paterson. It would appear that the plaintiff and her husband were living apart, and that the latter, with a view of obtaining evidence against her, had induced Richardt to go to her mother's house, where she lived, and obtain board, which he did, having been there about six weeks prior to the event chronicled, during which time, by assiduous attentions to the plaintiff's children, among other things by taking them out riding, he ingratiated himself with the plaintiff. On the day in question the children had been out riding with Richardt, and he returned with them to the plaintiff's mother's house, where they alighted, and then, as the plaintiff testified, upon Richardt's invitation she got into the wagon for the purpose of taking a short ride of five or ten minutes, intending to return in time for six o'clock supper; but, having got her into the wagon, Richardt, claiming that the horses were unmanageable, and permitting them to run, drove to Paterson. Whether, on arriving there, he went directly to the hotel or to a stable was one of the disputed questions of fact. Prior to their arrival, at about two o'clock on the same afternoon, the plaintiff's husband with a friend had reached the hotel and secured two adjoining rooms, and, in anticipation of the plot which had been arranged for in reference to his wife, registered for Richardt and the plaintiff in the hotel register as "William Allen and wife." As nearly as can be determined from the evidence, it was in the neighborhood of six o'clock when the plaintiff and Richardt arrived at the hotel, which they entered by the main entrance and proceeded to the restaurant, where oysters were ordered. While the plaintiff was in the restaurant, Richardt succeeded in communicating with the husband; and, upon returning to the restaurant, having complained about the oysters and the service, insisted on having a bottle of wine. This, the plaintiff testified, she protested against, asking of Richardt that he immediately take her home, but he told her that he would not comply until he had had the bottle of wine. It being a Sunday night, and the waiter refusing to serve the wine either in the dining room or the parlor down stairs, Richardt requested the plaintiff to go with him, as she states, to an upstairs parlor, where they could have the wine, he promising then to return home with her. Just what time was spent in the restaurant does not appear, but it is established beyond cavil that all the



occurrences in the hotel on that evening, up to the disappearance of Richardt, were over by eight o'clock, although it may have been some time after that before the husband took the plaintiff back to Montclair to her mother's house. According to the plaintiff, upon arriving at the door of the room upstairs, which was a small room with a bed and table in it, Richardt pushed her in, immediately locking the door, but opening it a few minutes afterwards to permit the waiter to hand in the bottle of wine and some cigars. From the bottle he poured out a drink for himself and about half a glass for the plaintiff, which she testifies is all she would take, and, feeling sick as the result of her experience, she sat down for a moment on a chair, when Richardt, who, according to the waiter's testimony, had removed his coat, suddenly turned out the gas, and at that moment went into the adjoining or connecting room, in which the husband and his friend were, and disappeared from the scene, whereupon the husband entered. Then followed a scene between the husband and wife, which, as has been stated, was all over so far as its violent character was concerned by eight o'clock, and some time thereafter the husband took the plaintiff to her mother's house.

It is conceded that the whole thing was an infamous plot on the part of Richardt and the husband to place the plaintiff in a questionable position. But, as was properly stated by the trial judge, for the injury which she suffered at the hands of Richardt and her husband the defendant was in no way responsible. His responsibility, if any, depended upon his giving, if he entered upon the subject at all, a truthful account of what occurred, and he was bound to show that the publication made and the pictures which purported to delineate the incidents narrated were true, made in good faith and justifiable. Comparing what actually occurred with what was published, it will be noticed, if the plaintiff's testimony is to be believed, that she and Richardt did not arrive at the hotel at five p. m.; that Richardt did not register; that they did not go to room 20 and then go down to supper, and did not return to the room at ten o'clock and remain for two hours or until midnight; that there were no woman's screams followed by the crash of a door, neither did any door smashing take place, and that Richardt, *alias* William Allen, did not escape from the room partly dressed, and

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did not leave his valise behind for the reason that he had none. Crediting the plaintiff's story, in these respects the article was false and untrue.

In view of the verdict we must assume, with respect to the disputed questions of fact, that the jury credited the plaintiff; and taking her version it is certain that, whether we regard the publication as a whole, or only that portion which was most damaging, relating to the going and returning to the room and remaining there for several hours, there was a failure to justify the publication. We must recall the rule that it is not enough to prove part of a libelous publication to be true, but the proof must be as broad as the charges. As stated in *Holmes v. Jones* (121 N. Y. 469): "Unless the defendant could justify that charge, even if he could have justified all the rest of the publication, the plaintiff would have maintained his action and been entitled to recover some damages." Whether the burden thus cast upon the defendant of proving the charges laid as broadly as made was sustained is disposed of adversely to him by the verdict of the jury, with which, based as it was upon conflicting evidence, we have no right to interfere.

It is claimed, however, that the error into which the trial judge fell in charging that the defendant's publication was libelous *per se* is fatal to the judgment. In this connection the appellant urges that a perusal of the article taken as a whole would convey the impression to all reasonable men that this plaintiff was the victim of a conspiracy and was not guilty of any moral fault; and we are referred to another well-settled rule of law, well expressed in *Press Publishing Co. v. McDonald* (63 Fed. Rep. 238) as follows: "Undoubtedly, when the words used are unambiguous and admit of but one sense, the question of whether or not they are libelous is one of law which the court must decide. Equally true is it that when the words used are 'ambiguous in their import, or may permit, in their construction, connection or application a doubtful or more than one interpretation, and in some sense be defamatory, the question whether they are such is for the jury.'" (See *Woodruff v. Bradstreet Co.*, 116 N. Y. 217.) If, therefore, taking the publications as a whole, they did not "impute some moral delinquency or some disreputable conduct to the person of whom they are spoken" (*Stokes v. Stokes*, 76 Hun, 316); or if the language or pictures did

not tend to expose the plaintiff to contempt, ridicule, hatred or degradation of character (13 Am. & Eng. Ency. of Law, 295); or if in the minds of reasonable people a doubt could exist as to whether the publication would have such a tendency, then clearly it was error for the court to hold as matter of law that the article was libelous *per se*.

Whether we take the publication as a whole, in connection with the pictures, or that portion which relates to the plaintiff going into a bedroom with a person other than her husband, and after being there some time going to the restaurant for the purpose of getting refreshments, and then voluntarily returning to the bedroom at ten o'clock and remaining there until midnight, when the door was burst open by an enraged husband, it is susceptible of but one construction, reflecting, if true, on the plaintiff's character for chastity and marital fidelity. Or, to use the language of the trial judge: "The nature of the published matter being such as to warrant the conclusion by any person reading it that, if true, it tended to show meretricious relations between a married woman and some other person than her husband is, of itself, libelous; it constitutes a libel *per se*, and the burden, therefore, is upon the defendant, who gave the matter publicity, to show you, by a fair preponderance of testimony, that the statements were true." We think that the trial judge could have gone further, and said that, from the fact that the "dodgers" were circulated before the periodical itself was published, followed, as they were by such publication, illustrated with a picture, among others, showing the "flight of the accomplice" in his shirtsleeves, and with his coat on his arm, no other inference could be drawn than that the defendant intended to convey the impression that the plaintiff had been engaged in wrongdoing. If there were any advantage in taking the different charges separately, it might be a debatable question whether or not the article was intended to convey the impression that there was a plot of which the plaintiff was the victim. But whether as the victim of such a plot or not, if she was guilty after arriving at the hotel of the conduct charged, her moral character, in the eyes of all respectable persons, would forever be regarded as bad; because, according to the publication, she voluntarily went with a man other than her husband into a bedroom, and, after remaining there with the door locked for some time, went with him to the res-

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taurant for refreshments, and again deliberately returned to the bedroom and remained there two hours, during which time champagne was served, and this seemingly agreeable intercourse in a bedroom was continued until midnight, when it was broken in upon by an enraged husband smashing the door and finding his wife reclining on the bed, and her paramour escaping in his shirtsleeves, leaving his valise behind him. If this is a fair paraphrase of the article, can it for a moment be contended that a married woman who would so demean herself was entitled to be regarded as a respectable and faithful wife? And would not knowledge that she had been guilty of such conduct estrange from her decent and self-respecting wives and mothers, and have a tendency to expose her to contempt, ridicule, hatred or degradation of character? We think it would be a reflection cast upon the moral sense and discrimination of the least intelligent of the readers of the *National Police Gazette* to conclude that such a publication with reference to a married woman did not impute to her some moral fault, and did not asperse her character for chastity; and the trial judge was, therefore, right in holding that the article was libelous *per se*.

This brings us to the third ground upon which a reversal is sought, namely, the question of damages, the appellant at the outset strenuously insisting that the court fell into error upon the subject of malice, which it was necessary to prove in order to justify the award of punitive damages. The argument is advanced that there is no evidence tending to show that the defendant was animated by any malice or ill-will towards the plaintiff, and, therefore, that exemplary damages could be awarded only upon the ground that the publication had been made recklessly and without a due regard for the truth; and we are again presented with the contention that the account given was singularly accurate and true. As we have already disposed of this contention in discussing the subject of justification, we need not go further than to say that we cannot, in view of the conclusion reached by the jury, conclude that the narrative of what took place was either accurate or true. Whatever doubt may have been created by the different expressions in the opinions of our courts, these are now set at rest, and it must be regarded as the settled law laid down in all the later cases that punitive damages are not limited to cases of actual malice, but may be

awarded for a libel recklessly or carelessly published, as well as for one induced by personal ill-will. (*Smith v. Matthews*, 152 N. Y. 152; *Warner v. Press Publishing Co.*, 132 id. 181; *Holmes v. Jones*, 121 id. 461; S. C., 147 id. 59.) The jury having decided, therefore, that the article was not essentially accurate or true, they were entitled to award punitive damages, provided they reached the conclusion that the publication was carelessly or recklessly made. As to this, we think that the circumstances preceding the actual publication were such that the jury might well have concluded, as they manifestly did, that the publication was so made. It must be remembered that this was not a daily newspaper, receiving the information over the wire, or hastily gathered and turned in by a reporter, without there being much opportunity for investigation as to its truth; but, in anticipation of the publication, the defendant caused "dodgers" or circulars to be distributed in the community in which the plaintiff lived, calling the attention of the people to the fact that such a publication was about to be issued, thus showing that the publication was deliberate, and that the opportunity for inquiring into the truth of the account intended to be published was afforded. There was no evidence adduced to show from what source the account was derived by the defendant; nor was there any evidence that the slightest inquiry was made, from whatever source received, as to its truth or falsity. As said, therefore, these were significant facts to be considered by the jury in determining whether or not the publication was recklessly or carelessly made; and with their conclusion that it was, they were entitled to award punitive damages, notwithstanding the fact that it was not shown nor claimed that the defendant personally knew the plaintiff or was actuated by any personal ill-will towards her. These same circumstances with reference to the circulation of the "dodger" impair to a great extent the appellant's argument that the damages were excessive. It is not our province to interfere with the subject of damages, which is peculiarly one for the jury, unless it can be seen that the verdict reached has been influenced by partiality, bias or prejudice; and in view of the facts appearing from which the jury could infer that this publication was made without inquiry into its truth and in disregard of the plaintiff's rights or character, and considering the distribution of the dodger or circular in the very

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community in which the plaintiff lived, the jury had the right, in their discretion, to punish the defendant, in addition to making reparation to the plaintiff for what they regarded as an injurious, reckless and wanton publication. In disposing of this branch of the case we cannot do better than to repeat what has been well said in the case of *Smith v. Times Publishing Co.* (178 Penn. St. 502): "The license which the press assumes to itself in the ruthless hunt for sensational news, and in the unsparing invasion of private affairs with which the public has no rightful concern, is the disgrace of modern journalism, and one of the greatest menaces to free institutions. It may well dispose juries in a proper case to give large damages, both compensatory and punitive, and with such verdicts the courts will not be readily moved to interfere."

We have also considered the further contention that the court erred in charging the jury that evidence in mitigation goes only to exemplary damages. Upon this, as upon the question of when punitive damages can, if at all, be awarded, whatever doubts may have formerly existed with regard to the rule, it has been disposed of so far as this court is concerned by the case of *Wuensch v. The Morning Journal* (4 App. Div. 115), wherein it is said: "The rule in this class of actions is that if the publication is not justified, the plaintiff is entitled to recover his actual or compensatory damages in any event. There can be no mitigation of this kind of damages. Mitigation extends or relates only to punitive or exemplary damages. A party if entitled to such actual or compensatory damages must be awarded such damages as the jury may find naturally and necessarily flow from the publication for injury to the plaintiff's reputation and character." (See, also, *Prince v. Brooklyn Daily Eagle*, 16 Misc. Rep. 188; *Bradley v. Cramer*, 66 Wis. 303.)

The minor points presented by the appellant may now be briefly examined. It is insisted that the learned trial judge erred in excluding the question asked of the plaintiff by the counsel for the defendant as to whether she remembered "the issue of the *New York Herald* of Tuesday, October 22, 1889, containing an article headed 'Wayward Mrs. Young.'" It is urged that, the defendant having pleaded in mitigation of damages the fact that this article had been published in other newspapers, and was published by him in good faith, he should have been permitted to show that fact; and in this

connection it is claimed that where a newspaper article charged as libelous has been taken from another paper and republished in the belief that it is true, and after investigation of the facts, evidence of such facts may be given in mitigation of damages. Without assenting to the soundness or unsoundness of this rule, it is sufficient for our purposes to say that the question excluded did not go to the extent of showing that the article was taken from another newspaper, or that it was investigated; nor was there any offer to prove any such thing made upon the trial. Standing alone, the fact as to whether or not the plaintiff saw or remembered anything about the article published in the *Herald* was in no way relevant.

Another error assigned is that relating to the following charge: "It is further admitted that, before the publication of the article and pictures complained of, and the issuance to the public of the paper containing the article and pictures, the defendant caused to be widely circulated in the town of Montclair, New Jersey, where the plaintiff then resided, a certain circular or handbill, which is in evidence before you, calling the attention of the public to the paper which was about to issue, and in which appeared the article and pictures in question." By his answer the defendant admitted that the article and pictures in the periodical, and also the handbill or dodger, had been published and circulated. Therefore, the only exception that could be taken was to the statement by the judge that it was widely circulated. His attention, however, was not called specially to such characterization, the discussion turning upon whether the publication and circulation were or were not admitted, which the judge properly decided, upon construing the pleadings, in the plaintiff's favor; and there was evidence, from which the inference could fairly be drawn, that the handbill was widely circulated in Montclair; one of the witnesses testifying that she had seen it in the hands of some school children in that place. While, therefore, the publication and circulation were admitted, there is no doubt that the question of the extent of the circulation would have been left to the jury, as practically it was by other portions of the charge, and the judge would have had an opportunity to withdraw that statement if his attention had been specially called to it. This exception was taken after the jury had retired, and it is not now disputed but that the proposition as made was correct, except in the particu-

lar pointed out. We think the value of verdicts would be impaired if they were liable to be set aside as the result of an exception taken blindly to an entire proposition of law, but which, upon appeal, is directed solely against a single word employed by the judge in characterizing an admission made by the pleadings, to which his attention was not directed either before the jury retired or when the exception was taken.

Verdicts would be equally insecure were we to reverse this judgment upon the ground of error, in permitting the plaintiff's daughter to testify as to her standing in the community. Strictly speaking, this was not a relevant inquiry, because the daughter's standing in the community was entirely immaterial. But it must be remembered that she was a member of the family, living with her mother, and it was but one way of showing what was the standing of the family of which the mother was the head in the absence of the father. There was no point made upon the trial as to the standing of either the mother or the daughter, and, apart from this question which was objected to, the jury would naturally have indulged in the presumption, in the absence of evidence to the contrary, that the standing of the daughter was good, and, therefore, the answer could not have been to any degree injurious. As to the mother, witnesses were produced who testified directly to her character and standing, and the defendant in no way attempted to assail or weaken their testimony, giving no evidence upon that subject.

We are left, therefore, to consider but one additional exception, and that relates to the so-called improper remarks of the counsel for the plaintiff in persisting, both in his opening and during the course of the trial, in bringing before the jury the fact that the plaintiff's husband and Richardt had been indicted and convicted for conspiracy in New Jersey. It is true that the counsel's remarks were subject to criticism. But they were not in this case entirely without justification, and, as will be seen from the occurrences upon the trial, no possible injury could have resulted to the defendant therefrom. Thus, in the opening, when the statement was made that two years after the publication of the libel the husband and Richardt were indicted and convicted for the offense of conspiring and plotting against the plaintiff, the objection was made that no such issue was



upon trial, and at the request of the defendant's counsel the judge instructed the jury that they must not be influenced by such remarks. Subsequently, in the course of the trial, the counsel inserted in questions to some of the witnesses the inquiry whether they knew that Richardt and the husband had been indicted, to which objection was made, and the objection was sustained. It will be noticed that the trial judge at no time instructed counsel that he had not the right to ask the question; and in counsel's view that it was material, we think he was entitled to present the question in such form as to have it ruled upon and obtain a proper exception, and he could not, to that extent, be regarded as having exceeded the limits allowed counsel in conducting his side of the case as long as the court did not direct him to desist from repeating the question. In his charge to the jury the judge called their attention directly to this matter in the following way: "And at this point I caution you not to confound the wrong which you may have gathered from the testimony that has been offered, and from what you have heard in the assertion of counsel — the wrong that may have been inflicted upon the plaintiff by her husband and Richardt, and others, by reason of the alleged plot, with the wrong charged in the complaint in this action. Do not confound the two. Whatever the liability of the defendant may be, he has not to account for or compensate the plaintiff for any wrong she has suffered by reason of the conduct of her husband or Richardt." From a careful consideration of all that occurred in respect to the efforts of counsel to introduce this line of testimony, and especially in view of the instructions from time to time given by the trial judge, we think that the jury could not have been misled thereby. Thus, it would appear that whatever injury or prejudice might otherwise have resulted was entirely removed and cured by the fact that in each instance the court, while according to the plaintiff's counsel his legal right to ask questions in his own way and have them ruled upon, was careful to take away from him any benefit which he might indirectly attempt to obtain by injecting this extraneous matter into the trial. It will, therefore, be seen that the conduct of counsel was not such as to constitute reversible error.

Upon an examination of the record, while acceding to the suggestion that the verdict is a large one, we have been unable to find any

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error which would justify our interfering with the conclusion reached by the jury after a trial unusually free from exceptions, and the issues in which were presented in a full and clear manner to the jury in a charge that was eminently fair and impartial, and which accorded to the defendant all his rights.

The judgment should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON and INGRAHAM, JJ., concurred.

INGRAHAM, J. (concurring):

I concur in the affirmance of this judgment, and wish merely to add a few words to the opinion of Mr. Justice O'BRIEN on the effect of the decision of *Wuensch v. The Morning Journal* (4 App. Div. 115). I do not consider that that case settles in this court the proposition claimed for it — that in no case can any facts be considered in mitigation of damages, except punitive or exemplary damages. That case came before the court on a motion to strike out the facts alleged as a “separate and partial defense, and in mitigation of damages.” These allegations were clearly inadmissible, either as a defense or in mitigation of damages of any kind. The incidental remark contained in the opinion, that “mitigation extends or relates only to punitive or exemplary damages,” was not at all necessary to the decision of that case, and could only be held to apply to the particular facts therein alleged, and not as a general statement of the law applicable to all cases of libel. No authorities are cited to sustain the proposition, and it is quite apparent that the question was not argued or necessary to the decision of the motion then before the court. The question cannot be said to be clearly presented in this case, as it is quite evident from the amount of the verdict that the jury considered that the facts of the publication were such as to justify them in awarding punitive or exemplary damages. The court, in its charge to the jury, expressly instructed them that they were not to award to the plaintiff any damages for that portion of the publication which had been proved to be true. Upon this subject the court charged as follows: “Did what really occurred there in New Jersey on that evening warrant the account which the defendant published? If it did, then the verdict should be for the defendant; if it did not, then it will be your duty to determine what portion of the matter in question has not been

shown by the defendant to be true; and, then, did the portion that remains, stripped of the portion that has been shown to be true, inflict any injury or damage upon the plaintiff? Bearing in mind, now, that view of your duty, you will proceed to determine what your verdict shall be." Thus the court, in directing the jury as to the parts of the publication for which they were justified in awarding compensatory damage, restricted them to that portion of the publication which was not shown to be true, and as they were limited to a finding of damage for the portion of the publication not shown to be true, the facts which were proved to be true could not be considered by the jury in mitigation of the damages caused by the part of the article not true. Counsel for the plaintiff then stated to the court: "Your honor has charged the jury that they may take into consideration the evidence adduced on the part of the defendant in mitigation of damages on the question of actual damage. Now the rule of law is that mitigation only goes to exemplary damages, and I ask you to so charge," to which the court answered, "I think that is so." We must consider this request and remark of the court in connection with the rule as to damage already charged, and I think it amounted to but this: That the court, having restricted the jury in the consideration of the amount that they should award as the actual damage inflicted upon the plaintiff by the libel to that portion of the libel which was not true, then stated that the facts proved which had been introduced in mitigation of damages should not be considered by the jury as mitigating the damage actually inflicted upon the plaintiff by the portion of the publication which had been proved to be true. I do not think that that charge was error. Whether or not what the court said to the jury was erroneous and requires a reversal of the judgment must be considered in relation to the facts of this particular case; and while I think that the remark of the court may be too broad as a general proposition, it would not be an error that would justify us in reversing the judgment if, as applied to the particular facts of this case, and to a rule of law which had been laid down by the court to govern the jury in their disposition of the question of damages, which rule of law had not been objected to by either party, no injury could result to the defendant. The general proposition, that in no action for libel or slander could facts alleged and proved in mitigation be considered

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by the jury in determining whether the actual damage has been in consequence of the whole publication, I do not consider as correct. The rule is stated generally in the case of *Wachter v. Quenzer* (29 N. Y. 551) as follows: "The defendant may set up a justification, or he may allege facts short of a full justification, but giving some color to the charge by way of modification, or he may do both; and in either case he may prove the facts as they are, though they fall short of a justification, and the jury may take them into consideration for the purpose of mitigating the damages." This statement of the general rule has been affirmed many times by the courts of this State, and by text writers upon the subject. In none of the cases that I have examined has it been expressly held, where the point was directly before the court for adjudication, that in no case can facts be proved which could be considered by the jury in mitigating the actual damage sustained by the plaintiff in consequence of the whole publication as alleged in the complaint. If a party is entitled to prove facts short of a full justification, but which give some color to the charge, and if the jury may take such facts into consideration for the purpose of mitigating the damages, it seems to me that it must be the damages sustained in consequence of the whole publication, and for which the plaintiff would be entitled to recover, if none of the facts alleged in the libel had been true. The amount of the damage that a person libeled is entitled to recover as compensation must necessarily be determined by the jury, not upon any fixed scale which can be stated as settled by a rule of law, but as compensation for the injury received in consequence of the publication of the libel taken as a whole, but that amount can be reduced if it should appear that a portion of the publication was true, for as to the injury inflicted by virtue of the publication of a true statement, no matter how injurious to the person of whom such statement is made, there cannot be a recovery.

The cases in which the court has stated that facts in mitigation of damages are evidenced only in mitigation of punitive or exemplary damages are cases in which the facts sought to be alleged were only relevant as showing the want of actual malice on the part of the defendant. An example is in the case of *Witcher v. Jones* (43 N. Y. St. Repr. 152) which was affirmed by the Court of Appeals in 137 New York, 599. There the court says: "In the absence of privilege,

the law conclusively implies malice, *i. e.*, want of legal justification, in the publication of an actionable libel, and, in any event, the plaintiff is entitled to full compensation for his injury. But, when beyond mere indemnity, the plaintiff seeks to recover exemplary damages, the fact of actual malice in the publication becomes a relevant and material consideration. Hence, in defeat or mitigation of exemplary damages, the defendant may introduce any evidence of which the legitimate tendency is to show that he was not actuated by a wanton or malicious motive, as, for instance, that the libel was uttered negligently or against his will, or in belief of the apparent truth of the defamatory charge." This decision and others of like character apply only to facts tending to show a want of actual malice on the part of the defendant, and it is clear that in those cases they cannot have the effect of mitigating the actual damage sustained by the plaintiff. But in a case where a publication consists of more than one libelous statement, and the defendant is justified in offering in evidence in mitigation of damages the partial truth of the libel, and such facts are to be considered by the jury in mitigation of damages, it would seem to me to follow that such facts are provable to decrease the damage which would have been sustained by the plaintiff by the publication as a whole if the defendant had failed to prove the truth of any of the facts alleged which constituted the libel.

I have before stated the reasons why I do not think that the instruction to the jury in this case was to the effect that the facts as proven could not be considered in mitigation of the actual damage sustained by the plaintiff in consequence of this entire publication, for the court had instructed the jury that they were not to consider upon the question of damages any part of the libel which had been proved to be true, and the other facts alleged in the justification apply only to the question of the defendant's malice and which necessarily were confined to the question of punitive damages.

In the rest of Mr. Justice O'BRIEN's opinion I concur, and, therefore, concur in the affirmance of the judgment.

McLAUGHLIN, J., concurred.

Judgment affirmed, with costs.

COMMERCIAL ADVERTISER ASSOCIATION, Respondent, v. DAVID O. HAYNES, Doing Business under the Firm Name of D. O. HAYNES & Co., Appellant.

Action by "*The Commercial Advertiser*" to restrain the use of the name "*New York Commercial*" by another newspaper.

In order that an injunction shall be granted to one newspaper to restrain another in the use of a title similar to the name of the former newspaper, the simulation must be such as is calculated to mislead the public, and consequently to injure the newspaper's circulation and patronage; if the simulation have such effect, it is immaterial that the name was innocently and conscientiously used.

Upon a motion made by a corporation which published a newspaper called *The Commercial Advertiser* to restrain the proposed publishing of a newspaper to be called the *New York Commercial*, it appeared that *The Commercial Advertiser* was a daily evening newspaper published in the city of New York, devoted to general news and sold at two cents a copy, while the *New York Commercial* was to be a daily morning newspaper published in the city of New York, devoted exclusively to commercial, financial, trade and shipping news and sold at five cents a copy, and that the two papers would be markedly dissimilar in their typographical arrangement and appearance.

Held, that the foregoing facts did not entitle the plaintiff to an injunction order restraining the defendant's use of the name *New York Commercial*;

That the fact that *The Commercial Advertiser* was popularly known as the *Commercial* or *The New York Commercial* did not give a proprietary right to *The Commercial Advertiser* to the exclusive use of the word *Commercial* regardless of any question of the actual or probable injury occasioned to it from the use of the name *New York Commercial* by another paper.

APPEAL by the defendant, David O. Haynes, doing business under the firm name of D. O. Haynes & Co., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of January, 1898, enjoining him from publishing any newspaper, the name and title of which shall be "*New York Commercial*," or any newspaper containing the words "*Commercial*" or "*New York Commercial*," as a partial title, unless in such partial title the word "*Commercial*" is used as an adjective in connection with a substantive in such manner as not to imitate any name or title by which the plaintiff's newspaper is known.

The plaintiff is a domestic corporation. As such, it is the owner of a daily evening newspaper which is published in the city of New York under the name of *The Commercial Advertiser* and is

devoted to general news. The defendant is the president and principal stockholder of the Shipping and Commercial List Company, which is the proprietor of a weekly commercial and financial newspaper called *The Shipping and Commercial List and New York Price Current*, also published in this city. He now proposes to change this weekly to a daily newspaper and to change its name to *New York Commercial*, retaining, however, the title of the weekly paper in conspicuous letters immediately beneath this new name. He also proposes to place between the words "New York" and "Commercial," in the new title, a vignette representing a woman holding scales in one hand and a sword in the other. The exclusively commercial character of the weekly is to be retained and the new daily is to be sold for five cents per copy. It should be added that this proposed new daily is to be markedly dissimilar to the plaintiff's evening paper in type, heading, arrangement, character and reading matter, and that it appeals to an entirely different class of readers. Some of the details of these distinctive matters of difference are stated in the opinion.

*Arthur H. Masten*, for the appellant.

*William Williams*, for the respondent.

BARRETT, J. :

We find nothing in the affidavits presented by the plaintiff to warrant the conclusion of the learned justice at Special Term that : "The proofs seem to clearly establish that the name adopted by the defendant for his newspaper will lead to its being confused with the plaintiff's newspaper, and that injury to the plaintiff and deception upon the public will result." It may be that some slight confusion will arise until the character of the two publications is clearly understood by newspaper writers and advertisers. There can, however, be no confusion on the part of sane purchasers. This possible confusion on the part of newspaper writers and advertisers may cause some temporary inconvenience to both parties, but there is not a particle of evidence that it has caused or is likely to cause "injury to the plaintiff and deception upon the public." Indeed, the only injury inferable from the facts stated in the plaintiff's papers, is possible injury to the defendant. The plaintiff's president says that letters

and a telephone message intended for the defendant have been received by the plaintiff. He does not state, nor does he even intimate, that letters or messages intended for the plaintiff have mis-carried or have been delivered to the defendant. He also says that orders for advertising intended for the plaintiff are frequently addressed to the *Commercial*, and that other journals throughout the country, in quoting from the plaintiff's paper, frequently give credit to the *New York Commercial*.

The only other attempt on the plaintiff's part to prove possible injury consists in mere expressions of opinion. Thus, Mr. James A. Hibson deposes to the probability of confusion arising out of the similarity of names and adds that "much business, especially advertising business, may thereby be lost to the *Commercial Advertiser*." Mr. George P. Rowell also expresses the opinion that, as a result of such confusion, "advertisements intended for the *Commercial Advertiser* will very frequently reach the office of the new paper called the *Commercial*." These opinions are combatted and more than met by opinions to the contrary effect, expressed by Messrs. Laffan, Lancaster, Criswell, Gordon and Hedge. These latter gentlemen say that there is no possibility of such confusion or of such pecuniary damage as the plaintiff claims, and their affidavits are controlling because of the undisputed facts which form the basis of their opinions.

These facts, as detailed by Mr. Laffan, are, in the main: That the differences in the physical appearance of the two papers are so marked and distinctive that no possibility for confusion would arise; that the titles of the two papers are printed in type of different size and wholly dissimilar character; that the type in the body of the two papers and the general typographical arrangement thereof are also different; that the defendant's paper has, as part of its title, a large wood cut or vignette, while the plaintiff's has none; that the character of the two papers is entirely different; that the plaintiff's is an evening newspaper, which publishes the general news of the day and which is sold at two cents a copy, while the defendant's is a morning paper, which confines itself to commercial, financial, trade and shipping news and which is published at five cents a copy.



Upon these proofs, the case for an injunction is not nearly as strong as was that for the plaintiff in *Borthwick v. The Evening Post* (L. R. [37 Ch. Div.] 449), where an injunction granted by Mr. Justice KAY was reversed by the lords justices. The plaintiff there was the publisher of an old and established newspaper called *The Morning Post*. The defendants, who had acquired control of a newspaper called *The Daily Recorder*, proceeded to issue an evening paper which they called *The Evening Post*, adding in smaller type under this title the words, "with which is incorporated *The Daily Recorder*." There was some similarity between the printing of the name and the general typography of the two newspapers, and it appeared that several applications had been made at the office of *The Morning Post* for copies of *The Evening Post*. The lords justices reversed the injunction order upon the ground that there was no reasonable prospect of damage or injury to *The Morning Post*. Lord Justice CORTON summed the case up in these words: "In my opinion, in order to justify the court in granting an injunction, we ought to be satisfied that there probably will be injury to the pockets of the plaintiff. \* \* \* There is only a suggestion of possible injury, and I think we ought not to act on that." Lord BOWEN said that he thought "a trick has been attempted by the new paper," but he concurred in the reversal upon the ground that *The Morning Post* was "not likely to be hurt." Lord Chief Justice COLERIDGE put his judgment upon the ground that there was no evidence "that, at least as regards *The Morning Post*, any damage has been inflicted."

Speaking of the application that had been made at the office of *The Morning Post* for copies of *The Evening Post*, he added: "There have been twenty applications, and twenty only, made to *The Morning Post* for copies of *The Evening Post*. \* \* \* But it is not suggested — at least there is no evidence given of any kind — that a single copy less of *The Morning Post* has been sold than would have been if the defendants had not taken the action they have.

"Under those circumstances, it seems to me that there is not enough in this case to warrant the interference of the court by injunction."

The rule which governs in motions of the present character is well stated in this latter case. That rule is that while the court will

undoubtedly afford relief against such a simulation of the plaintiff's publication as is calculated to mislead the public and consequently to injure the newspaper's circulation and patronage, yet it will not interfere where no harm has been done to the plaintiff or is likely to be done to him by the publication complained of. The cases, both in England and in this country, are all one way as to this general principle (*Bradbury v. Beeton*, L. J. [39 Ch.] 57; *Ingram v. Stiff*, 5 Jur. [N. S.] 947; *Lee v. Haley*, L. R. [5 Ch. App.] 155; *Clement v. Maddick*, 5 Jur. [N. S.] 592; *Snowden v. Noah*, Hopk. Ch. 347; *Bell v. Locke*, 8 Paige, 75; *Talcott v. Moore*, 6 Hun, 106; *Stephens v. De Conto*, 4 Abb. Pr. [N. S.] 47; *Matsell v. Flanagan*, 2 id. 459; *Investor Pub. Co. of Mass. v. Dobinson*, 82 Fed. Rep. 56; *Richardson & Boynton Co. v. Richardson & Morgan Co.*, 8 N. Y. Supp. 53; *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas*, 1 id. 44), and the real question here, therefore, is as to its applicability to the present facts. It is on this latter head alone that we differ with the learned justice below. We entirely agree with him that "the adoption of a name which, though not an exact imitation of the whole name used by the injured party, is calculated to deceive and mislead, may be enjoined." We find nothing, however, in the facts presented by the plaintiff to justify the conclusion that the adoption and use by the defendant here of the name *New York Commercial*, in the manner and under the circumstances disclosed, is calculated to deceive any purchaser or advertiser—to quote Vice-Chancellor MALINS, in *Bradbury v. Beeton* (*supra*)—"of common intelligence and observation."

The plaintiff's counsel also contends that its newspaper is popularly known as the *Commercial* or *The New York Commercial*, and that the courts, to quote the language of his brief, "protect the popular name as readily as they do the real name." Assuming the latter proposition to be correct, it does not aid the plaintiff. The fact that its newspaper in common parlance is known as the *Commercial* or *The New York Commercial*, may be a consideration bearing upon the question of actual or probable damage. It does not, however, of itself, give a proprietary right to the exclusive use of the adjective, regardless of any question of actual or probable injury to the plaintiff. In fact, the plaintiff does not claim the right

to enjoin *any use whatever* of the adjective *Commercial* in connection with newspaper publications. On the contrary, it frankly admits that the defendant cannot be restrained from naming his paper *The New York Commercial List* or *Commercial America*. It would seem to follow that even if the popular voice has given the plaintiff a property right in the popular phrase, yet the defendant cannot be restrained from naming his paper *New York Commercial*, unless his doing so misleads, or tends to mislead, the public to the actual or probable injury of the defendant. It is fundamental in all such cases that the plaintiff must show that deception is probable or he cannot succeed in obtaining the relief he seeks. (Sebastian on Trade Marks [2d ed.], 245.) If he shows such deception, actual or probable, and consequent injury, actual or probable, he is entitled to protection, even though his trade mark has been innocently and conscientiously made use of. So far we can freely go with the learned counsel of the plaintiff. But we cannot quite follow his reasoning when he contends that the public, by its short way of referring to *The Commercial Advertiser*, has given the plaintiff some kind of an undefined trade mark in this popular form of speech — a doctrine which would equally apply to a “soubriquet” or diminutive; that such popular form of speech has thus become the plaintiff’s “property,” and that its unauthorized use by the defendant, *whether likely to injure the plaintiff or not, should be absolutely enjoined as an invasion of a strict property right.*

We think this position is fanciful and far fetched. It is certainly supported by none of the cases which he cites. And it ignores the fundamental doctrine upon which relief in this class of cases is afforded, namely, misleading, or the tendency to mislead, with consequent injury, actual or probable.

It follows that the order appealed from should be reversed, with ten dollars costs and the disbursements of the appeal, and the motion for an injunction denied, with ten dollars costs.

VAN BRUNT, P. J., RUMSEY, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion for injunction denied, with ten dollars costs.

# Cases

DETERMINED IN THE

## SECOND DEPARTMENT

IN THE

### APPELLATE DIVISION,

February, 1898.

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FRANK F. SPENCER and CARO A. T. SPENCER, Appellants, v.  
HENRY WEBER, Respondent, Impleaded with Others.

*Trust — when a trustee holding a mortgage has power to assign it and his assignee to receive the principal — the mortgagor is not bound to see that the money is properly applied.*

The will of a testator directed his executors to invest \$6,000 upon bond and mortgage, and bequeathed part of the income thereof to his mother and part to his sister for their lives, and provided that after the death of either or both of them the interest money should be "collected, controlled, managed and held in trust" by a trustee for the benefit of the testator's two children, "in such manner as shall yield the greatest aggregate increase."

By a subsequent clause the testator directed that the executors should immediately deliver the mortgage to a specified trustee who was to "control and manage said securities, receive, collect and pay over the interest and principal due or to grow due thereon, and in all things to carry out the directions and provisions of this will as to said investment of six thousand dollars and any matter connected therewith;" and upon the two infant children of the testator respectively attaining their majority, an event which was, in the case of the youngest child, fifteen years distant, they were each to obtain a moiety of the principal of the fund and of any interest thereon.

*Held*, that under the will the trustee had the power to vary the investment and change the securities;

That the mortgagor was protected in paying the mortgage upon the maturity thereof to the attorney of the trustee to whom the trustee had assigned it, and was not bound to ascertain whether the trustee had acted providently or honestly in so assigning it.

Where a trustee has power by the terms of his trust to manage the securities and vary the investment, he has power to transfer the personal property of the trust and to collect the moneys and incidentally to give proper discharge therefor, and the debtor is not bound to see to the proper application of the moneys by the trustee to the purposes of the trust.

APPEAL by the plaintiffs, Frank F. Spencer and another, from a judgment of the Supreme Court in favor of the defendant Henry Weber, entered in the office of the clerk of the county of Kings on the 15th day of July, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term dismissing the complaint upon the merits.

*George H. Fletcher*, for the appellants.

*Thomas E. Pearsall*, for the respondent.

GOODRICH, P. J. :

The action is primarily brought to foreclose a mortgage of \$3,000, made by the defendant Henry Weber and wife to the defendant Alston, as substituted trustee under the will of Thomas T. Spencer, deceased. Incidentally the plaintiffs demand that the assignment of the mortgage by the trustee to the defendant Maben and a certificate of satisfaction executed by Maben be adjudged void and vacated.

Thomas T. Spencer died on October 28, 1877, leaving a will which was admitted to probate in January, 1878, and contained the following provisions :

“*Fifth.* As soon as my said executors shall receive or realize the sum of six thousand dollars (\$6,000) from the avails, or on account of my estate, in excess of the amount required for the payment of my debts and funeral expenses, I authorize and direct them to invest the same, that is, said \$6,000, for the benefit of my two minor children, Caroline Ann Taylor Spencer and Frank Fessenden Spencer, on bond and mortgage on unincumbered real estate (which may be on my real property by them sold or other real property) of twice the value of the amount loaned, at an interest of and at the rate of seven per cent per annum, payable semi-annually.”

“*Seventh.* I give and bequeath the said principal sum of six thousand dollars, so to be invested as aforesaid, and the income thereon, as hereinafter stated, to my said two children, Caro A. T. Spencer and Frank F. Spencer, to be divided and apportioned between them as hereinafter stated, and I direct that the said investment shall remain intact and invested as aforesaid until my eldest child, Caro A. T. Spencer, shall arrive at full age, when I order and direct that a moiety of said principal sum, together with a moiety of the

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interest and increase thereon, set forth in the last clause of the eighth paragraph of this instrument, be paid to Caro A. T. Spencer for her sole use and benefit. I direct that the remaining moiety of said principal sum shall remain intact and on interest until my youngest child, Frank F. Spencer, shall arrive at full age, when I order and direct that the said remaining moiety of said principal sum, together with the remaining moiety of interest and increase thereon set forth in said last clause of the eighth paragraph of this instrument be paid to said Frank F. Spencer for his sole use and benefit.

*"Eighth.* I give and bequeath to my said mother, Sarah Spencer, from the interest growing out of said loan of six thousand dollars for and during the term of her natural life, the annual sum of three hundred and forty dollars (\$340), and direct that the same be paid to her in quarterly payments of eighty-five dollars (\$85) each, less charges for collecting and paying the same, and I give and bequeath to my said sister Sarah Reynolds out of said interest for and during the term of her natural life, the annual sum of eighty dollars (\$80) and direct that the same be paid to her in quarterly payments of twenty dollars (\$20) each, less legal charges for collecting and paying the same. Upon the death of my said mother and sister Sarah, or either of them, I direct that the legacies herein given to them shall cease; and all interest money on account of said investment of six thousand dollars from that time forth shall be collected, controlled, managed and held in trust by the United States Loan and Trust Company, located in New York city, for the benefit of my said children, Caro A. T. and Frank F., until they shall respectively arrive at full age, and in such manner as shall yield the greatest aggregate increase.

*"Ninth.* As soon as my said executors shall have invested said six thousand dollars as hereinbefore directed, I authorize and direct them, my said executors, to transfer and make over to said United States Loan and Trust Company the securities so taken on account of said investment, to be received by said company in trust for the benefit of my said two children, Caro A. T. Spencer and Frank F. Spencer. And it is my will and direction that thereafter said United States Loan and Trust Company shall control and manage said securities, receive, collect and pay over the interest and princi-

pal due or to grow due thereon, and in all things to carry out the directions and provisions of this will as to said investment of six thousand dollars and any matter connected therewith."

The executors collected the sum of \$6,000 and invested the same in two bonds of \$3,000, which were secured by mortgage on real estate in the city of Brooklyn, one made by one Monghan, and the other by one Streker. The United States Loan and Trust Company refused to accept the appointment of trustee under the will, and Alston was substituted as trustee in its place. On September 22, 1882, Spencer's executors duly assigned and delivered to Alston, trustee as aforesaid, the two bonds and mortgages. Thereafter Alston foreclosed the Streker mortgage and the premises were sold for the sum of \$4,125 to the defendant Henry Weber, to whom the premises were conveyed by the referee on foreclosure, Weber giving in part payment a bond and mortgage upon the premises, to secure \$3,000 of the purchase money, the mortgage being payable to said Alston as trustee of the estate of Thomas T. Spencer, deceased, on July 1, 1886, and the present action relates to this mortgage.

On October 23, 1883, Alston, "as trustee of the estate of Thomas T. Spencer, deceased," executed an assignment of the bond and mortgage to Wilber B. Maben, a lawyer and the legal adviser of Alston as trustee. From that time the interest money, as it became due, was paid by the mortgagor to Maben. At the maturity of the mortgage on July 2, 1886, Weber paid Maben the principal and the interest then due on the mortgage, and obtained a certificate of satisfaction, which was recorded in the office of the register of Kings county. The record of the mortgage was marked "canceled of record."

Caro A. T. Spencer, the elder child, became of age on July 22, 1890, and Frank, the younger child, on March 6, 1893. In September, 1896, a citation was issued requiring Alston to settle his accounts, and in such proceeding the surrogate made a decree that Alston should pay to the children, as beneficiaries of the trust, the principal and interest of the fund. Execution was issued and returned unsatisfied, and Alston absconded. Maben died about June, 1886. The action was tried at Special Term, and a judgment was entered in favor of the defendant Weber, dismissing the com-

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plaint upon its merits, and from this judgment the present appeal is taken.

The plaintiffs contend that the mortgagor was bound, before dealing with Maben, to ascertain his powers, and that such knowledge could have been obtained by an examination of the will, under which the trustee had no power to satisfy the mortgage when once executed, while the respondent contends that, even if he were bound to that course, the trustee and his assignee or attorney (in whichever capacity Maben was acting) had power to accept payment of existing mortgages, and that, while he was bound to keep the investment of \$3,000 intact, he had the right to vary the investment and to receive the principal and reinvest the same. This question must be settled by a reference to the terms of the will, where we may derive the intention of the testator, for that is at once the source and the limitation of the trustee's power. The testator directed the executors, as soon as they had realized the sum of \$6,000, to invest the same on bond and mortgage for the benefit of the two minor children; and further bequeathed the said principal so invested and the income thereon to the children, said investment to remain intact and invested until the elder child became of age, when she was to receive a moiety of the principal, interest and increase, the remaining moiety to remain intact until the younger child became of age, when he was to receive the other moiety, and in case of the death of either one before majority, the share of the deceased child to go to the survivor, and in case of the death of both before attaining majority, he bequeathed the children's legacy to his brothers and sisters. He also bequeathed three-quarters of the income of the children's legacy to his mother during her life, and one-quarter to his sister during her life, and, after the death of both of them, all interest money on account of said investment from that time forth was to "be collected, controlled, managed and held in trust by the United States Loan and Trust Company," for the benefit of his children until they respectively arrived at full age, and in such manner as to yield the greatest aggregate increase. The executors were directed to turn over the bond and mortgage securities, immediately after their receipt, to the company as trustee, to be received by it in trust for the children, and it was to "control and manage said securities, receive, collect and pay over the interest and principal due or to



grow due thereon, and in all things to carry out the directions and provisions of this will as to said investment of six thousand dollars and any matter connected therewith."

It is clear that the scheme of the testator was that there should be no discretion conferred upon the executors as to the investment by them of a sum of \$6,000 on bond and mortgage on unincumbered real estate of twice that value, and that thereupon they were to turn these papers over to the trustee, which should thereafter control and manage the securities. There is some difference in the collocation of words used in the paragraphs of the will referred to as to the interest and as to the principal. As to interest, in one paragraph the trustee was authorized, in case of the death of the mother and sister, to collect, control, manage and hold in trust the interest money until the children respectively arrived at majority, in such manner as should yield the greatest aggregate increase, while by another paragraph the trustee was authorized to control and manage said securities and receive, collect and pay over the interest and principal due or to grow due thereon.

It is not evident to my mind why the testator repeated in the paragraphs the word "interest;" but the words "collect," "manage" and "control" are used in both paragraphs in respect to interest as well as principal. Thus it would seem that the testator intended to give the trustee the same power of collection as to principal which it possessed as to interest. It can hardly be supposed that the testator expected that any investment or mortgage could be obtained which would in terms extend over the period of fifteen years minority of the younger child, before the trustee could, under the provisions of the will, pay over to such child his share of the estate. Common experience shows that such a long period for the payment is seldom provided in a mortgage. It is true that while many mortgages remain uncollected for many years, yet almost invariably the term of payment named therein is a short one, seldom exceeding two to five years. These facts, coupled with the right of the mortgagor by the terms of his mortgage to pay off at maturity, show quite clearly that a trustee could hardly be expected to invest the legacy upon a mortgage non-payable for fifteen years, and if he could not be expected to do this, then, in order to carry out the intention of the testator to keep the legacy intact, he would be compelled

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to invest and reinvest the principal and to change from one mortgage security to another as often as the mortgagors should elect to pay off their mortgages. In other words, the trustee had power to control and manage the investment and to change and vary the securities.

The rule is that where a trustee has power by the terms of his trust to manage the securities and vary the investment as circumstances may arise, making such change and variation necessary, he has power to transfer the personal property of his trust and to collect the moneys and incidentally to give proper discharges therefor; and the debtor is not bound to see to the proper application of the moneys by the trustee to the purposes of his trust. (Perry Trusts [3d ed.], §§ 225, 814; *Kirsch v. Tozier*, 143 N. Y. 390.)

It was also held in *Dillaye v. Com. Bank of Whitehall* (51 N. Y. 345) that, under similar conditions, even the assignment of a mortgage impressed with a trust, to a *bona fide* purchaser or pledgee, cannot be impeached by the *cestui que trust*. It is not necessary to discuss the question whether Maben was in fact a *bona fide* purchaser. The question is whether the mortgagor, when he paid off the mortgage, was bound to inquire into that fact or could rely upon the production of an assignment of the mortgage to Maben, pay the principal to him and obtain a satisfaction piece therefor. "The assignment from a client to his attorney is not void; it is voidable and may be attacked; but I know of no authority which compels a *bona fide* dealer with an attorney to inquire into the circumstances to see whether the dealings of the attorney with his client are such as to make the transaction void. The assignment of the mortgage to Maben contained the usual condition constituting Maben the lawful attorney of Alston, "to have, use and take all lawful ways and means for the recovery of the said money and interest."

In the case of *Field v. Schieffelin* (7 Johns. Ch. 150) it was held by Chancellor KENT that the guardian for an infant has the legal right to sell and assign a bond and mortgage made by him to such guardian in the due exercise of his discretion, before the maturity thereof, the necessity or expediency of such sale resting entirely in his judgment and discretion, and that the purchaser is not bound to inquire into the necessity of the assignment, or see to the application of the purchase money. In the case of *Suarez v. de Montigny* (1 App. Div. 494) the court recognized the doctrine cited from Perry

on Trusts (*supra*), and also cited the case of *Kirsch v. Tozier* (*supra*). There are authorities which favor the contention of the plaintiffs as to the payment of a mortgage to a trustee before its maturity. It is unnecessary to refer to these authorities, as in the present case the mortgage was only paid at maturity, in accordance with its express terms. Even if it be said that the mortgagor was put upon notice of the terms of the mortgagee's trust, it is evident that he would have only been bound to notice the fact that, by the terms of the trust instrument, *i. e.*, the will, the trustee had power to manage, control and invest, and the power to vary and change the securities; and this power, within the authorities cited, would have justified him in paying off the mortgage at maturity as he did.

We are of the opinion stated by the learned justice at Special Term, so far as he holds that the trustee had power under the will to change the investment, that he was not restricted to holding a single mortgage until the younger child became of age; that he could sell it and invest the proceeds otherwise, and that the mortgagor was not required to ascertain whether the trustee acted providently or honestly in his disposition of the mortgage. It becomes unnecessary, under our views, to consider the other question, whether or not the plaintiffs' right of action has expired by limitation.

The judgment is affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

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BERTHA KABATCHNICK, Respondent, v. JACOB KABATCHNICK,  
Appellant.

*Alimony*—when the objection that the defendant is unable to pay it will not be sustained.

Although the report of a referee, appointed upon an application made by a husband for the reduction of alimony (of twenty dollars a week) directed to be paid by him in a suit for a separation, states that he is financially unable to pay any alimony, the Appellate Division will not interfere with a direction that he pay ten dollars per week, where it appears that the fees of the attorney employed by him upon the application and the cost of printing the papers used upon the appeal amount to enough to have paid all alimony directed to be paid by the order, from the time of the rendition of the judgment to the present time.

APPEAL by the defendant, Jacob Kabatchnick, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 17th day of November, 1897, modifying a judgment in a suit for separation by reducing the alimony from twenty dollars to ten dollars per week.

*Wm. Henry Knox*, for the appellant.

*James C. Cropsey*, for the respondent.

GOODRICH, P. J. :

In the judgment the defendant was ordered to pay the plaintiff twenty dollars a week for the support of herself and five children, with a provision that application could be made to reduce the amount of alimony, upon any change in the condition of the parties or their children. The defendant applied at Special Term for an order reducing the amount of the alimony; the matter was referred to a referee to ascertain whether there had been any change in the condition of the parties since the entry of the judgment, and the referee reported that in his opinion there had been no such change as to justify a reduction of the alimony. A motion was made and granted to send the matter back to the referee, directing him, without taking further testimony, to report as to the ability of the defendant to pay the alimony, and the referee reported that at the time of the judgment the defendant had no means to pay the alimony, although for some time thereafter he paid the same; that there had been no material change in his ability since that time, and that his ability to pay alimony remained unchanged.

On motion to confirm the two reports, an order was made at Special Term, directing a modification of the judgment by reducing the past and future alimony from twenty dollars to ten dollars per week and ordering the defendant to pay the same. From this order the defendant appeals.

It is not necessary to summarize the evidence upon which the report of the referee and the order of the court were based. It is sufficient to say that we can find no reason to change the terms of the order.

One of the grounds on which the appeal is largely argued is that

the defendant is unable to pay the reduced amount of alimony. His contest in this proceeding has resulted in hearings before the referee, which commenced on March 13, 1897, and continued in various sessions till May eleventh, during which time over 600 folios of oral testimony of twelve witnesses were taken. The record on appeal contains more than 300 pages. Counsel was employed by the defendant, whose fees, from the care manifested by him in the conduct of the reference and proceedings and in the brief and argument of the appeal, will assume no mean proportions, and, together with the expenses of printing the record and brief, if capitalized by the defendant for the support of his wife and children, would, probably, have been sufficient to form a fund out of which he could have paid all the moneys which he is directed to pay by the order of the Special Term, from the date of the original judgment up to the present time.

Under these circumstances we are not swift to seek reasons for a reversal of the order, and the examination of the whole record confirms us in the opinion that the order should be affirmed, with ten dollars costs and disbursements.

All concurred, except BARTLETT, J., not sitting.

Order affirmed, with ten dollars costs and disbursements.

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LAURA LOUISE TODD, Individually and as Administratrix with the Will Annexed of MARY A. MASTERTON, Deceased, and Others, Plaintiffs, v. CLARENCE F. TODD and Others, Respondents; SMITH LENT, Referee to Sell, Appellant.

*Judgment directing the sale for cash of premises upon which legacies are charged—right of legatees who purchase to have their legacies credited upon the purchase price.*

An interlocutory judgment, entered in an action in which all the persons interested in an estate were parties, adjudged that certain legacies were specific charges upon the premises in question, and directed that such premises be sold for cash; that the costs, disbursements, fees and commissions be deducted, and that the balance be distributed as directed by the final judgment. The premises were accordingly sold and were bid in at the sale for four of the legatees.

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*Held*, that, upon an application by all of the interested parties, the Special Term had power to make an order requiring the referee who conducted the sale to file his report of sale to the four legatees, upon the payment to him in cash of a sum sufficient to cover the costs and the expenses of the sale, and to receive as cash the receipts of the four legatees for such portions of their respective legacies as should equal the balance of the purchase price.

APPEAL by Smith Lent, the referee appointed in an interlocutory judgment in the above-entitled action to sell the real estate therein described, from an order of the Supreme Court, made at the Orange County Special Term and entered in the office of the clerk of the county of Westchester on the 27th day of August, 1897, directing him to file his report of sale.

*Smith Lent*, for the appellant.

*W. E. Kisselburgh, Jr.*, for the respondents.

GOODRICH, P. J. :

The record on appeal is somewhat meagre, but the following facts may be gathered therefrom : The parties to the action were all the persons interested in the estate of Mary A. Masterton and Caroline Masterton, both deceased, and they made an agreement to have the present amicable action commenced for the purpose of determining their respective rights. The action was referred, report made and interlocutory judgment entered, which, among other things, adjudged legacies of \$1,000 each, due Mary L. Todd, Roberta Todd, Emma R. Todd and Clarence F. Todd, and \$2,000 due Laura L. Todd, the mother of the first four named persons, to be specific charges on certain premises on Dixon street, Tarrytown, directed the sale of such property and payment of the costs and disbursements of the plaintiffs' attorney and the guardian of the infant defendants, all to be taxed, and that the referee should deduct his own commissions, fees and expenses of sale, and, after giving the deeds, distribute the proceeds as directed by the final judgment to be entered in the action. The judgment contains a clause, "that said sale be made for cash and that any of the parties hereto may purchase at such sale." The premises were put up for sale under terms of sale which required the payment of ten per cent of the purchase money at the time of the sale and the residue at the time of the delivery of the deed, all the taxes and incumbrances to be allowed by the referee out of the purchase money upon production of proof of payment thereof.

At the sale S. C. Pratt purchased the property for \$4,100, but did not pay the ten per cent. His reasons therefor, as stated in the moving affidavits, are that he was the husband of Roberta Pratt (whom I assume to have been formerly Roberta Todd), and that he made the bid as the agent of Marie L. Todd, Emma R. Todd, Clarence F. Todd and Roberta Pratt; that these parties desired to pay and offset the purchase price of the property with the aggregate amount of their legacies; that the four children intended that the mother, Mrs. Laura L. Todd, should share in part with them the property in question. There was also annexed to the moving papers a letter addressed to the plaintiff's attorney and signed by Laura L., Mary, Roberta and Emma, comprising all the plaintiffs, requesting that the purchase price of the land should be offset against the legacies. Thus it appears that all the persons interested in the premises joined in the application to the Special Term.

The referee, in accordance with the judgment, as he was justified in doing, required the payment of the ten per cent, and refused to execute a deed or make a report of sale until the purchase price was paid in cash. The four children, through their counsel, obtained from one of the justices an order directing the referee to show cause why the sale alleged to have been made to them should not be consummated by the execution of a deed, and a report of sale made in the action. At the hearing at Special Term the referee appeared to oppose the motion, and an order was made directing him to file his report of sale to said four parties, on the payment to him of \$410, which sum he was directed to apply towards the expenses of sale and costs when taxed, and that the four parties should deliver to him their receipts for such portions of their respective legacies as the purchase price, less the sum of \$410, might equal, and that the referee should receive such receipts as cash. From this order the appeal is taken by the referee.

The judgment shows that the parties making the application are the only persons interested in the premises in question, and that the aggregate amount of the legacies exceeds the amount of the bid; but I find no evidence of the amount of the costs and the expenses of the sale, and it is, therefore, not clear that the \$410 will be sufficient to pay these amounts. Assuming that it is sufficient, there seems to be no good reason why the only persons interested should

be compelled to go through the idle ceremony of paying to the referee a sum of money in cash, which, from their condition of life, as shown by the moving papers, they will have great difficulty in doing, and, perhaps, may not be able to do at all. They are the only persons interested in the matter; the object for which the suit was instituted has been accomplished, and the property has been purchased for their common account.

It is true that the judgment requires in form that the payment be made in cash, and it might be the better practice to amend the judgment in accordance with the relief granted by the order of the Special Term, but it would seem that the same purpose was attained by the order that the receipt of the parties be deemed equivalent to cash payments. At any rate the order of the court is the protection of the referee.

The order is so far modified as to require the taxation of the costs and expenses referred to in the judgment, and that, upon the payment thereof to the referee, and the delivery to him of the receipts specified in the order appealed from, he execute the deed to said four children and make his report of sale accordingly.

The order appealed from is affirmed, without costs to either party.

All concurred.

Order modified as indicated in opinion of GOODRICH, P. J., without costs to either party.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. J. CARLTON WARD,  
Appellant, v. UPTOWN ASSOCIATION, Respondent.

*Expulsion of a member from a club—notice that a charge will be considered at a hearing before the board of directors—the proof may be made as broad as the notice—mandamus.*

A member of an association, incorporated under chapter 267 of the Laws of 1875 and subject to the provisions of the Membership Corporation Law (Chap. 559 of the Laws of 1895), issued a circular letter to the other members of the association, criticising the action of the board of directors in rejecting a person proposed for membership and suggesting that a special meeting of the members be called at which the by-laws might be so amended that the person rejected



could be elected to membership and "similar club mistakes" be prevented, and stating that the person proposed had been rejected by two blackballs.

The board of directors, which had, under the by-laws of the association, power to annul a membership for conduct likely "to endanger the welfare, interests or character of the association," sent a letter to the member, stating that upon a certain day it would hold a meeting to consider the matter of the circular "in its prejudicial bearing upon the interests of the club," and requesting him to be present at the meeting "to give such explanations as you may desire to make in justification of your action."

At the meeting, the president of the board, after calling upon the member to state why he had issued the circular, refused, against the objection of the member that such proceeding was not in accordance with the letter of notification to him to appear, to permit him to discuss the rejection of the proposed member, but confined the trial to the consideration of the statement in the circular that only two blackballs had been cast against the person proposed for membership, which was charged to be a false statement, and subsequently the board expelled the member.

Upon an appeal from an order dismissing an alternative writ of mandamus issued to review this action of the board of directors, it was

*Held*, that the relator was entitled, under the letter of notification, to discuss the rejection of the proposed member as being one of his reasons for issuing the circular, and also to show as another of such reasons that the clerk of the club had informed him that only two blackballs had been cast upon such rejection;

That, under the circumstances, the relator was entitled on the trial of the issues in the mandamus proceeding to have submitted to the jury the question whether he had been given reasonable notice to defend himself upon the charge upon which he was expelled, *i. e.*, of making a willful or reckless misstatement in the circular.

APPEAL by the relator, J. Carlton Ward, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of June, 1897, dismissing an alternative writ of mandamus, with notice of an intention to bring up for review upon such appeal an order entered in said clerk's office on the 25th day of May, 1897, granting the defendant costs against the relator.

This appeal was transferred from the first department to the second department, as several of the justices of the Appellate Division of the first department were members of the Uptown Association.

*Elihu Root* [*Henry L. Stimson* with him on the brief], for the appellant.

*William H. Sage*, for the respondent.

GOODRICH, P. J. :

The relator in March, 1896, applied at Special Term for a writ of mandamus to compel the Uptown Association to reinstate him as one of its members. The application was denied, but on appeal the Appellate Division of this department, to which the appeal had been transferred, reversed the order of the Special Term and directed the issuance of an alternative writ of mandamus (9 App. Div. 191). This writ was issued and the issues arising under it came on for trial before the court and a jury in May, 1897, and resulted in the direction of a verdict for the defendant, and from the final order dismissing the writ the relator appeals.

The Uptown Association is a membership corporation in the borough of Manhattan, organized under chapter 267 of the Laws of 1875, and governed in its action by the Membership Corporation Law (Chap. 559, Laws of 1895). The by-laws provide as follows: "Section 1. The Board of Directors shall have charge and supreme control of all the affairs of, and of every committee of, the Association; it shall ballot for all candidates for admission to membership, and shall serve as a Court of Appeal before which all questions and differences affecting the interests of the Association may be laid, subject to its final decision."

On November 13, 1895, Mr. Bristol, another member of the association, proposed, and the relator seconded, the nomination of Mr. Siegel for membership in the club. On January 8, 1896, the board of directors by a vote of nine to one rejected the application of Mr. Siegel for admission. On January sixteenth Ward and Bristol sent to the members of the club a circular, the material parts of which read as follows:

"NEW YORK, January 16, 1896.

"*To the Members of the Uptown Association:*

"GENTLEMEN.—The undersigned proposed and seconded Mr. Henry Siegel for membership in the Uptown Association on the 13th day of November, 1895. Mr. Siegel was further seconded by Mr. Frank J. Sprague, Mr. Louis Auerbach, Mr. Marinus L. Vanderkloot and Mr. Elias Rothschild. Mr. Siegel's name having remained on the bulletin board for an unusual length of time, we, on the 7th day of the present month addressed the following letter to a number of gentlemen upon the Board of Management:

“DEAR SIR.—As mover and seconder of Mr. Henry Siegel for membership of the Uptown Association, we respectfully protest against the great length of time his name has been posted upon the bulletin board of the club. Understanding that Mr. Siegel has an enemy in your honorable board, who has declared that Mr. Siegel will not become a member of the Uptown Association, we have written to a few prominent people who we naturally thought knew Mr. Siegel, and stated the facts. We have replies as follows, the original letters being at your disposal. (Here follow excerpts from letters of several residents of Chicago commendatory of Mr. Siegel.) These ‘recommendations,’ which, from the action of your board, seem necessary for the best interests of the club, could be very greatly extended. In conclusion, we do not think that the Uptown Association can longer afford to treat Mr. Siegel in the manner that it has, and we hope to be immediately advised of his election as a member of the club. Yours very truly, Jno. I. D. Bristol, J. Carlton Ward.’

“Under date of the 8th inst. we were informed by Mr. H. J. Park, secretary, that Mr. Siegel had not been elected. We naturally look upon the whole proceeding of blackballing Mr. Siegel as a serious mistake, and as not by any means the expression of the wishes of the great majority of the club. The only question that is paramount in this whole matter is whether Mr. Henry Siegel is a fit member for the Uptown Association. In proposing Mr. Siegel we had in view his modest, genial and gentlemanly qualities; the fact of his being the leading member of the firm of Messrs. Siegel, Cooper & Co., whose three million dollar enterprise is now under way within a block or two of the club house, and that additional members of the standing and reputation of Mr. Siegel, who are pronounced factors in the development and growth of the Greater New York, are to-day the great need of the Uptown Association as a successful club. The immediate rectification of the ill-advised act of blackballing Mr. Siegel should appeal, we believe, to the sense of right of our brother members, and we now seek for advice and counsel in this matter, and hope to receive from you an immediate reply. We are of the opinion that a call for a special meeting of the club, as provided in Article XXIII of the by-laws, should be immediately sent out, and that at this meeting the neces-

sary amendments to the by-laws be made in order that Mr. Siegel can be elected to membership as soon as possible, and similar club mistakes, in so far as the Uptown Association is concerned, be things of the past. In this connection, and in view of the forthcoming annual meeting and election of the club, it might also be borne in mind that but two blackballs rejected Mr. Siegel, and that the circumstances under which those balls were cast should be carefully considered by all the club members.

“ Very truly yours,

“ JNO. I. D. BRISTOL.

“ J. CARLTON WARD.”

Bristol also made an entry in the proposal book which reads: “ Mr. Siegel was blackballed Jan’y 8th, 1896. Don’t buy his crockery from a certain man.”

Another section of the by-laws reads as follows:

“ Sec. 4. The board shall have power, by a vote of at least nine of its members, to annul the membership of any member of the Association for any conduct on his part which, in their judgment, may be likely to endanger the welfare, interests or character of the Association.”

In the exercise of this power the board, on January twenty-second, sent the following letter to the relator:

“ DEAR SIR.—The Board of Directors has under consideration the circular letter issued by you in regard to the rejection of Mr. Siegel as a member of this club. There will be an adjourned meeting of this board on Wednesday, the 29th inst., at 2 o’clock, to consider this matter in its prejudicial bearing upon the interests of the club. You are requested to be present at this meeting to give such explanations as you may desire to make in justification of your action.

“ Very respectfully,

“ HOBART J. PARK, *Sec’y.*”

A similar letter was sent to Bristol, which contained an additional charge as to the entry in the proposal book. On the twenty-ninth day of January, the day named in the letter, Ward and Bristol appeared before the board, and there is considerable divergence of testimony as to what occurred at that time. The relator testified

that Mr. Sloane, the president, said: "We consider this circular prejudicial to the best interests of this association, and some of the statements in that circular are untrue. You are expected and will be given an opportunity to make such explanation as you see fit to make as to why you issued that circular;" that he did not point out that the false statement contained in the circular was that Siegel was rejected by only two blackballs; that then, turning to Bristol, he said: "You are called here likewise to answer the same charge, with an additional reason why you have written something in one of the books of the club;" that he, Ward, arose and commenced to read from a paper which is not in evidence, but which commenced with the following words: "At the outset I want to say the one thing paramount in my mind has been the thought what is for the best interests of this association. This statement seems necessary from the wording of the letter requesting my attendance here to-day. Now, to go back, and in reviewing my course I want to say," — that at this point he was interrupted by one of the board, who said: "We simply wanted to know why you issued that circular. We don't care to review anything else. We are not here to discuss the merits of the election or rejection of Mr. Siegel, but the question is simply, why did you issue that circular?" that thereupon he took his seat, and Bristol arose and said that they were busy men and the only way to interview the members was to issue a circular and get from them an expression of opinion so that there could be a special call to amend the by-laws, when this mistake of blackballing Mr. Siegel could be rectified; that they asked to have put upon the minutes of the meeting that they objected to such proceeding; that it was not in accordance with the invitation, and that they could not discuss why they issued the circular without bringing in the name of Mr. Siegel, and when the directors refused to hear them on this subject that they asked to have an adjournment of the hearing to enable them to prepare a defense in line with the by-laws.

On the other hand, several of the directors were examined as witnesses, and testified that the president stated to Ward and Bristol that they were cited to answer for the issuing of the circular which contained matters prejudicial to the interests of the club, false statements concerning the matters of the club, and as to certain

writing in the proposal book on the part of Mr. Bristol; that when Ward was interrupted he said: "Well, if I cannot go into Mr. Siegel's rejection I have nothing further to say — without going into the matter of Mr. Siegel's rejection." After the two men retired, the board, by the unanimous vote of the fourteen members present, expelled them from membership in the club.

At the close of the testimony at the trial the relator asked that the following questions be submitted to the jury: "*First.* Did the relator have reasonable notice to defend himself upon the charge of making a willful or reckless misstatement in the circular of January, 1896? *Second.* Was the relator expelled upon that charge? *Third.* Was such a charge established? *Fourth.* Did the relator have a fair and reasonable opportunity for explanation and defense upon the charges against him?"

The court directed the jury to find a verdict for the defendant: "That the relator had sufficient notice of the charge against him, and sufficient opportunity to be heard in his defense, and that the Board of Directors, in expelling him, had cause for the expulsion decreed," to which the relator excepted.

On the previous appeal in this case (9 App. Div. 191) the court held: "We think that the relator had the clearest and most undeniable right to appeal to his fellow-members either to alter the by-laws or to change the personnel of board of directors; that for this purpose he had the right to state any material fact; and to fairly criticize any action of the governing authorities of the club. It may be unfortunate that there should be a difference of opinion or disputes in club management, but dissension is a hazard to which all associate action is liable, and clubs no more than other organizations can expect to be exempt from this hazard. Of course, the relator had no right to make any misstatement of fact or cast unfounded aspersions on the directors or his fellow-members. \* \* \* The opposing affidavit states that in fact nine ballots were cast against the candidate instead of two. If the relator knowingly published a false statement on this subject, or even recklessly made one without seeking to ascertain whether it was true or false, such conduct would be a sufficient ground for action by the board of directors. But the notification to appear before the directors seems to indicate as the relator's offense his appeal to his fellow-members, and not

any false statement or unfair criticism made in that appeal. This, as we have said, could not of itself be an offense." The court also stated that on the return to the writ it could "be determined what the proceedings against the relator were, what was the charge against him, and what he was tried for."

It will thus be seen that the purpose of the alternative writ directed on the former appeal was to determine on the trial: *First*, what was the charge against him? *Second*, what were the proceedings against the relator? *Third*, for what was he tried? And these subjects we shall consider in their order.

*First.* What was the charge against the relator? This must be derived, we think, solely from the directors' letter of January twenty-second, in which they stated that the board had under consideration the circular letter issued by him, and its prejudicial bearing upon the interests of the club.

*Second.* What were the proceedings against the relator? The directors had the power, under the by-law above quoted, to expel a member "for any conduct on his part which in their judgment may be likely to endanger the welfare, interests or character of the association," and this was also the limitation of their power. They indicated the purpose and intention of the hearing, when, in the notice of January twenty-second, they said that the matter under consideration was the issuance of the circular. The directors would have been acting within their power if they had summoned the relator for trial on any matter contained in the circular, and if there had been fair notice given of the object of the trial, their proceedings in this respect would have been regular and authorized.

It is evident, however, from the testimony of the defendant's witnesses that the board intended to, and did, confine the trial simply to the false statement in the circular, without permitting the relator to make any explanation as to his reasons for issuing the circular. The relator was called upon by the president of the board "to make such explanation as you see fit to make as to why you issued that circular." The relator was proceeding to give such explanation when he was summarily stopped and prevented from giving his reasons why he issued the circular. It makes no difference that, to the minds of the directors, his reasons might not have been relevant or sufficient. The "why," was what he was directed to give, and was

attempting to give, and he had a clear right to give the "why." The matter which the directors had under consideration was stated by the president to be that the issuance of the circular was "prejudicial to the best interests of this association," and the relator was then informed that he was then to have an opportunity to make such explanation as he saw fit why he had issued the circular. A new and very important piece of evidence in relation to this subject appears in the present record, viz., that the relator and Bristol, who were acting together before the directors, asked that there should be entered on the minutes of the meeting the fact that they objected to this proceeding as it was not in accordance with the letter of the directors, and claimed that they could not discuss the reasons why they issued the circular without bringing in the name of Mr. Siegel. It does not appear by the record whether or not this request was complied with. This changes altogether the condition present in the former appeal, where this court said that it appeared that the relator made no complaint that the charge was not definite, and that, consequently, he could not raise that question on appeal. The contrary now appears.

We think that the witness was improperly and unjustly prevented from giving the reasons, and all the reasons, which operated on his mind for issuing the circular, and if one of these reasons was that Mr. Siegel was improperly or unfairly rejected from membership, he should have been heard in his defense. If the directors had, in their letter, limited their charge against the relator to the false statement at the end of the circular, as to the number of blackballs cast, and had seen fit to give the relator opportunity to be heard on that matter alone, they might have excluded all other matters, but the door was opened widely both by the letter and the statement of the president. The refusal to permit the relator to state his reasons was not in accordance with the letter, and he should have been permitted to state his opinion as to the rejection of Mr. Siegel. When he was stopped he said that if he could not go into the matter of Mr. Siegel's rejection he had nothing further to say; without going into the matter of Siegel's rejection he had nothing to say. But it would seem as if he had the right to explain that the reason why he had issued the circular was the very subject embraced and stated in the



circular, and to give any other reasons for issuing it, as he had been summoned to give these reasons and was trying to explain them. It may not be assumed that the directors alone of all members had the best interests of the club at heart. It may be assumed that private members were as much interested as the directors in the welfare of the club. The office of director confers certain responsibilities of management and control upon such officers, but they are, after all, only representatives of their associates. Their action is subject to fair criticism by any associate. Suppose, for instance, that the relator intended to state, as we may infer from his circular and the beginning of the statement which he commenced to read, that he intended to say that one of his reasons for issuing the circular letter was to call a special meeting of the members to amend the by-laws in such a way that members at large, instead of the directors, should vote upon the admission of new members, was not that a reason to be given why the relator had issued the circular? Had he no right to explain this, and to give as one of the reasons which had induced him to issue the circular that an apparent injustice to a person proposed for membership might be repeated in the cases of other applicants, as he claimed had been done in Seigel's case, and that such injustice could be prevented by a vote of all the members?

*Third.* What the relator was tried for. From the foregoing remarks it is evident that the sole matter upon which the relator was tried and expelled was the false statement in this circular, that Mr. Siegel was rejected by only two blackballs, and that the circumstances under which the balls were cast should have been carefully considered by the committee.

The directors addressed the relator a letter after the trial, in which it was stated that the board, acting under section 4 of the by-laws already quoted, had annulled his membership, and a reference to this section shows that it relates to conduct on his part which, in the judgment of the board, might be likely to endanger the welfare, interests or character of the association. But the particular action of the relator which thus endangered the welfare of the association was not specified.

The relator's first request to submit to the jury the question whether he had reasonable notice to defend himself upon the charge of making a willful or reckless misstatement in his circular would

be disposed of by our former opinion, in which it was said: "But the notification to appear before the directors seems to indicate as the relator's offense his appeal to his fellow-members, and not any false statement or unfair criticism made in that appeal. This, as we have said, could not of itself be an offense. \* \* \* The relator appeared before the board, and seems to have no complaint that the charge was not definite. Therefore, he cannot now raise that objection." But it now appears by the record that he did not assent to the limitation of the inquiry to the giving of the reasons why he issued the circular, but claimed the right to be heard in accordance with the notice contained in the letter of the directors, and this evidence required a submission of the question as to reasonable notice to the jury.

As to the second request, whether the relator was expelled upon that charge, we think there was sufficient evidence to justify the direction of a finding that the relator was tried by the board upon the charge of making a willful or reckless misstatement in the circular.

The third and fourth requests to submit the questions whether the charge was established before the board and whether the relator had a fair and reasonable opportunity for explanation and defense upon the charges against him, are so closely allied that they must be considered together. We are not called upon to express any opinion as to the action of the relator in sending out the circular and making the false statement as to the blackballs, therein contained, but there was evidence tending to show that Mr. Johnson, the clerk of the club, had informed the relator and Bristol that only two blackballs were cast against Mr. Siegel. He was entitled to give this as one of his reasons for issuing the circular; but the relator's line of defense was demolished by the vigorous ruling that he could not be permitted to discuss the rejection of Mr. Siegel, whereupon he asked for an adjournment of the proceedings for a few days, so that he could come in and make a "defense in line with the by-laws of the association," and this was refused by the board.

Upon the last two questions there was evidence of such a conflicting character as to require the submission of both questions to the jury, and the refusal of the learned court to do so was reversible error.

The order appealed from must be reversed, with costs to abide the event.

All concurred, except BARTLETT, J., not sitting.

Final order reversed and new trial granted, costs to abide the event.

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JAMES V. LAWRENCE and WILLIAM F. LAWRENCE, Respondents, v.  
EDWARD THOMPSON, Defendant; MARY H. THOMPSON, Appellant.

*Evidence to establish a partnership — declarations made in the absence of the alleged partner — a witness' understanding as to the person referred to is incompetent.*

Declarations of a husband, made in the absence of his wife, tending to show that they were partners, are not competent, as against the wife, to establish that relation; nor can a witness be permitted to testify that he understood that the husband, in making such declarations, used the word "we" as including his wife.

APPEAL by the defendant, Mary H. Thompson, from a judgment of the City Court of Yonkers in favor of the plaintiffs, entered in the office of the clerk of said court on the 9th day of December, 1896, upon the verdict of a jury, and also from an order bearing date the 8th day of January, 1897, and entered in said clerk's office, denying said defendant's motion for a new trial made upon the minutes.

*William J. Marshall*, for the appellant.

*I. J. Beaudrias*, for the respondents.

PER CURIAM:

The action was brought to recover a balance due for goods sold and delivered to the firm of E. Thompson & Co., which firm the complaint charged was composed of the defendants. Mary H. Thompson, alone, answered and defended, denying the partnership and her liability. Assuming that there was enough shown on the trial to justify the submission to the jury of the question of the defendant Mary H. Thompson's interest in the firm, it is clear that a mass of incompetent evidence was admitted, only a single instance of which it is necessary to recite. A witness for the plaintiff was permitted to give the following testimony as to declarations of that defendant's husband, made in her absence: "Q. And, in speaking

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of that unfinished work, do you know whether or not he used the language, 'I' or 'we have that work?' A. I think he always used 'we.' Q. From all the questions of Mr. Thompson and his wife and your dealings and conversations with him, who did you understand 'we' meant? A. Well, I understood and always believed that it was his wife. I didn't know of anybody else at that time." The declarations of the husband were not competent as against his wife, and even had they been made in the presence of the wife, so as to bind her, the witness should not have been permitted to testify to his understanding of their effect. The declarations themselves should have been proved, and if there was any doubt as to their meaning, or as to what persons or to what matters they referred, the question of the meaning or reference was for the jury, not for the witness. Both questions were objected to, and the testimony admitted over the defendant's objection and exception. This was plainly error.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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JAMES HENDERSON, Respondent, and LILLIE F. TOTTEK, Plaintiff, v.  
LOUIS F. BRENNECKE and Others, Appellants.

*Execution — levy upon property of which the judgment debtor is a tenant in common  
— remedy of the co-tenant where the sheriff sells the entire property.*

Where a bill of sale to two vendees is valid as to one and invalid as to the other of them, a levy may be made by a sheriff, under an execution against the vendor, upon, and he may take possession of, the common property; in such a case the vendee whose title is valid, being a cotenant with his vendor, cannot maintain an action of replevin against the sheriff for the property levied upon, although it seems that he may, if the sheriff assumes to sell the entire property, maintain an action of conversion against him.

APPEAL by the defendants, Louis F. Brennecke and others, from a judgment of the Supreme Court in favor of the plaintiff James Henderson, entered in the office of the clerk of the county of Rich-

mond on the 30th day of October, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 27th day of October, 1897, denying the defendants' motion for a new trial made upon the minutes.

*James B. Lockwood*, for the appellants.

*James L. Barger*, for the respondent.

CULLEN, J. :

The defendant Brennecke recovered a judgment against William H. Totten and Mary L. Totten, composing the firm of William H. Totten & Co. On that judgment an execution was issued, and the sheriff of Richmond county levied on the chattels, the subject of this action. The plaintiffs claimed title to the property under a bill of sale given to them by Totten & Co. On the refusal of the sheriff to surrender the property, the plaintiffs instituted this action, which is in replevin to recover its possession. Subsequently, the appellants were substituted as defendants in place of the sheriff. On the trial evidence was given tending to show that, as to the plaintiff Henderson, the sale was made in satisfaction of a *bona fide* debt due to him from Totten & Co. The consideration of the sale to Lillie F. Totten was the individual note of William H. Totten to her. It appeared that the firm of Totten & Co. was insolvent at the time of the sale to the plaintiffs. The trial court held that the appropriation of the partnership assets to the payment of the individual debt of the partner William H. Totten was fraudulent and void as against partnership creditors, and dismissed the complaint as to the plaintiff Lillie F. Totten. The case was submitted to the jury on the claim of the plaintiff Henderson and a verdict rendered in his favor. From the judgment entered upon that verdict this appeal is taken.

The trial court sustained the bill of sale, so far as the title of the plaintiff Henderson, on the authority of *Commercial Bank v. Bolton* (20 App. Div. 78), and held that that plaintiff was a tenant in common of an undivided half of the property. Assuming that this ruling was correct, we are of opinion that it was insufficient to enable Henderson to maintain the action. As the transfer to the plaintiff Lillie F. Totten was void as against the judgment creditors

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of the firm, the execution justified the sheriff in levying upon the property and retaining possession thereof. It is settled by authority that where the execution is against one member of a firm or one of several tenants in common for his individual debt, the sheriff may levy upon and take possession of the common property. (*Phillips v. Cook*, 24 Wend. 389; *Waddell v. Cook*, 2 Hill, 47; *Walsh v. Adams*, 3 Den. 125; *Fiero v. Betts*, 2 Barb. 633.) The sheriff being entitled to seize the property, an action of this nature could not be maintained, for one tenant in common cannot sue his cotenant in replevin. (*Hudson v. Swan*, 83 N. Y. 552.) It is urged that subsequently the sheriff assumed to sell the entire property, not merely the interest of the judgment debtors therein. This would constitute a conversion as against the tenant in common upon whom there was no claim, and the latter might, in an appropriate action, recover the value of his interest. We cannot see how the fact has any bearing on this action, which is not to obtain the value of the chattels, as upon a conversion, but to obtain their actual possession, to which the plaintiff Henderson was not entitled as against the sheriff, and for which no action can be maintained by one cotenant as against another. The plaintiff, upon or before a new trial, may doubtless obtain leave to amend his complaint and avoid the technical objection to the present form of action.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and a new trial granted, costs to abide the event.

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REBECCA J. BENNETT, Respondent, v. CATHARINE M. VONDER BOSCH, Appellant, Impleaded with Another.

*Action of ejectment — not changed into an equitable one by a demand for unnecessary equitable relief.*

The complaint in an action alleged that a certain deed executed to, and a will made in favor of, one of the defendants were void because the grantor and testatrix was of unsound mind at the time of their execution, and was induced to execute them by the fraud of such defendant, and demanded that the plaintiff,

as heir at law of the grantor and testatrix, recover an undivided one-seventeenth part of the premises, with damages for the withholding thereof.

*Held*, that the action was one at law and was maintainable ;

That the fact that the plaintiff, in addition to the above relief, asked that the conveyance and will be declared invalid and of no effect, and that the same be set aside and canceled of record, and that the said defendant be barred from setting up or asserting her pretended title to the land, did not change the character of the action or indicate an intention on the part of the plaintiff to sue in equity, and thus waive her constitutional right to a trial of the issues in the action before a jury in a common-law action.

APPEAL by the defendant, Catharine M. Vonder Bosch, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 22d day of December, 1897, granting the plaintiff's motion to strike the action from the Special Term calendar.

*Theodore H. Silkman*, for the appellant.

*Robert L. Redfield*, for the respondent.

CULLEN, J. :

This action is brought to recover an undivided one-seventeenth part of certain real estate in Westchester county. The complaint sets forth that one Frances Lyons was seized in fee and possessed of the premises ; that on the 28th day of January, 1897, she executed and delivered to the defendant Vonder Bosch what purported to be a conveyance of the same ; that thereafter the said Frances Lyons made and executed a paper purporting to be her last will and testament, whereby she devised the same premises to said defendant ; that on the 8th day of June, 1897, the said Frances Lyons died intestate, leaving this plaintiff one of her heirs at law and entitled to one-seventeenth of her real estate ; that at the time of the execution of the said deed and will the said Frances Lyons was of unsound mind, incompetent to make a deed or will, and that the same were procured by the fraud of the defendant. The plaintiff demands judgment that she be awarded an undivided one-seventeenth part of the premises, with damages for withholding the possession from her ; that the pretended conveyance and alleged will be declared invalid and be set aside and canceled of record, and that the defendant Vonder Bosch be barred from setting up title under the same.

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The execution and validity of a will, so far as it purports to devise real estate, have always been the subject of legal cognizance in this State, and can be tested in an action of ejectment. (*Corley v. McElmeel*, 149 N. Y. 228.) The deceased is alleged to have been *non compos*. If such were the case her deed was void in law, though it might be upheld in equity where it appeared that it was taken in good faith for a valuable consideration, and without notice of the grantor's incapacity. (*Van Deusen v. Sweet*, 51 N. Y. 378; *Riggs v. American Tract Society*, 84 id. 330; *Goodyear v. Adams*, 5 N. Y. Supp. 275.) It is, therefore, plain that the plaintiff has the constitutional right to try the issues in this controversy before a jury in an action at law, unless she has waived it by asking in her demand for judgment that the pretended conveyance and the said alleged will be declared invalid and of no effect, and that the same be set aside and canceled of record, and that the defendant Vonder Bosch be barred from setting up or asserting her pretended title. We think this should not be regarded as indicating an intention by the plaintiff to appeal to a court of equity. If the plaintiff succeeds in her action the deed and will necessarily are of no effect, and it requires no judicial declaration on the subject further than the judgment awarding the recovery of the premises. Nor would it be necessary that the defendant should be enjoined from setting up her title; judgment in this action would necessarily conclude her claims in any subsequent litigation. We think it would be going too far to hold that this unnecessary and it may be improper claim for judgment should operate to change the nature and character of the plaintiff's action. The case is plainly to be distinguished from that of *Loomis v. Decker* (4 App. Div. 409).

The order appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.



In the Matter of the Petition of THOMAS F. GILROY, Commissioner of Public Works of the City of New York, under and in Pursuance of Chapter 490 of the Laws of 1883 and the Laws Amendatory Thereof, on Behalf of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, for the Appointment of Commissioners of Appraisal under said Acts.

In the Matter of the Claim of WILLIAM P. LYON and JERE M. LYON, Copartners, and Composing the Business Firm of LYON BROTHERS; WILLIAM P. LYON and JERE M. LYON, Copartners, Composing the Business Firm of LYON BROTHERS, Appellants; THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

*Eminent domain—the taking of land used for business purposes—the general character of the business, but not its profits, may be proved—the owner may prove the value of the land as used for any purpose.*

Where a plot of land, having a store thereon, in which the owners have carried on business as merchants, is taken in condemnation proceedings, the owners, in a proceeding to determine its value, are entitled to show the general character of the business, but not the profits which they had realized from it; such profits depend largely upon judgment, forethought, business skill, the use of capital and the condition of trade, all of which are elements foreign to the value or location of the land itself.

*It seems*, that, in such a proceeding, the owner is entitled to show the value of the land for any purpose for which it may be used, even though he may have put it to a different use.

APPEAL by William P. Lyon and Jere M. Lyon, copartners, composing the business firm of Lyon Brothers, from so much of an order of the Supreme Court, made at the Dutchess County Special Term, bearing date the 18th day of January, 1896, and entered in the office of the clerk of the county of Westchester, confirming the report of commissioners of appraisal appointed in condemnation proceedings, as affects the rights, property interests and business of the firm of Lyon Brothers, and also from the report of the said commissioners.

*William P. Fiero*, for the appellants.

*H. T. Dykman*, for the respondent.

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CULLEN, J. :

It has been so often held that an award of commissioners of appraisal will not be set aside as inadequate, unless the inadequacy is so palpable as to shock the sense of justice, that it is unnecessary to reiterate the rule or cite authorities for its support. The present case is not of that character, and unless the commissioners erred in the principle on which they made their determination, their report must stand.

The whole premises of the appellants were taken. The sole question, therefore, presented to the commissioners for determination was the market value of the property. The premises consisted of a plot of land with a store thereon, where for many years the appellants had carried on business as merchants. On the hearing before the commissioners the appellants sought to prove the profits they had made in their business during a term of years. This testimony was rejected: we think properly. It is doubtless competent for the landowner to prove the value of the land taken from him for any purpose for which it may properly be used, and he is entitled to that value, even though he may put the property to a different use. It was of course competent to show that the property was used for business purposes and was suitable for such purposes, for as a rule business property demands a higher price than property used merely for the purpose of residence. It was also competent to show the general character of the business, for property desirable or available for business of a certain character commands higher prices than property only suitable for business of another character, but the profits the occupants had realized from the business carried on upon the property does not tend to show the value of the property itself. In *Newton v. Armstrong* (19 N. Y. Supp. 573) it was held that evidence of the profits derived from carrying on a mill was not competent evidence of value in a proceeding to acquire the mill property. It was there said: "The testimony did not properly tend to prove the value of the mill. The size and capacity of the mill, and the extent of the water, of course, were relevant. But an inquiry into the owner's business involved other elements: The owner's business skill, the price of labor, the absence or presence of competition — which did not affect the value of the property." This is true in a greater degree in the case now before us, as the only use

of the property was as a place in which to do business. The same rule was held in *Edmands v. Boston* (108 Mass. 535); *Cobb v. Boston* (109 id. 438); *Pittsburgh & Lake Erie R. R. Co. v. Robinson* (95 Penn. St. 426). Even in the case of personal injuries occasioned by the tortious act of another, it has been held that proof of the past profits of a commercial business in which the plaintiff was engaged and from the prosecution of which he had been debarred by the injury, was not competent on the question of damages. (*Masterton v. Village of Mt. Vernon*, 58 N. Y. 391.) *A fortiori* should this be the rule in condemnation proceedings. There is no reason to believe that the appellants may not carry on their business as successfully at some other location as upon the property which has been taken from them. But however that may be, the testimony involves a consideration of too many elements foreign to the inquiry before the commissioners to be proper evidence. The profits of the business would naturally depend far more largely upon the judgment, forethought and business skill of the appellants, the use of their capital and the condition of trade, than upon the value or location of the particular property upon which the business was conducted.

The order and report appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order and report affirmed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM P. LYON  
and JERE M. LYON, Appellants, v. JOSEPH W. HALSTED and  
Others, Assessors of the Town of Bedford, Respondents.

*Assessment for taxation—an award, made in condemnation proceedings, under chapter 490 of 1883, refused by owners as inadequate and deposited in a trust company to their credit.*

The owners of lands, taken by the city of New York in condemnation proceedings instituted under chapter 490 of the Laws of 1883, by section 10 of which the title vested in the city upon the filing of the oath of the commissioners of appraisal, refused to accept an award of \$10,000, upon the ground of its inadequacy, and the money was deposited in a trust company to the credit of

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the owners, who took an appeal to the Appellate Division from the order confirming the report of the commissioners.

*Held*, that the town assessors were justified, under subdivision 4 of section 2 of the Tax Law (Laws of 1896, chap. 908), in assessing the owners upon the \$10,000 so deposited.

APPEAL by the relators, William P. Lyon and another, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 22d day of November, 1897, dismissing a writ of certiorari issued to review the proceedings of the respondents, the board of assessors of the town of Bedford, Westchester county, N. Y.

*William P. Fiero*, for the appellants.

*Charles Haines*, for the respondents.

CULLEN, J. :

This is a certiorari to review an assessment of the personal property of the relators for the purpose of taxation. The relators owned certain real estate in the county of Westchester, which was acquired by the city of New York under the provisions of chapter 490 of the Laws of 1883, for the purpose of supplying an increased supply of pure and wholesome water to that city. In 1896 commissioners of appraisal made an award to the relators of \$10,000 for the land so taken from them. The report and award were confirmed. From that order the relators have taken an appeal, which is still pending, claiming that the amount of the award was insufficient. (See *ante*, 314.) Upon the confirmation of the report the relators declined to accept the award, which amount was deposited in a trust company to the relators' credit. The assessors in their assessment have charged the relators with the ownership of this sum of \$10,000, and to review the propriety of such action this proceeding was taken.

I think the action of the assessors was clearly right. By section 10 of the statute already cited, the title to the lands sought to be acquired vested in the city of New York upon the filing of the oath of the commissioners of appraisal. Therefore, long anterior even to the time when the award was made the relators had been divested of their real estate, and acquired in lieu thereof a claim for damages against the city of New York. By subdivision 4, section 2 of the

Tax Law of 1896 (Chap. 908), personal estate and personal property are defined to include "chattels, money, *things in action*, debts due from solvent debtors, whether on account, contract, note, bond or mortgage, debts and obligations for the payment of money due or owing to persons residing within this State, however secured, or wherever such securities shall be held," etc. There can be no question that the right of the relators to compensation for the lands of which they had been deprived was a thing in action. A chose in action is a personal right, not reduced to possession, but recoverable by suit at law. (2 Kent's Com. 351; 1 Burrill's Law Dict. 288.) "The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action." (*Sheldon v. Sill*, 8 How. [U. S.] 449.) "The statute, by 'chooses in action,' refers to a particular species of property recognized by the law, and which, upon the death of the owner, would be inventoried as such by his legal representatives." (*Dry Dock Bank v. American Life Ins. & Trust Co.*, 3 N. Y. 356.) Certainly, upon the death of the relators before receiving compensation, their rights would pass to their personal representatives as part of their personal estates. Therefore, we are of opinion that even before the award was made there was a property right which under our laws is subject to taxation. It is probable that until the award was made the amount of the claim and its value was too uncertain to justify the assessors in listing it. But the commissioners have awarded the relators the sum of \$10,000; the city has acquiesced in that award, and the relators alone have appealed from it on the ground that it is inadequate. We think this justified the assessors in determining that the right of the relators to compensation was of the value of at least \$10,000.

There is nothing in the case of *The People ex rel. Osgood v. Commissioners* (99 N. Y. 154) in conflict with these views. There it was held that the executors were not entitled to deduct, for the purpose of taxation, from the estate held by them the amount of claims against the estate which were disputed and contested. In that case the nature of those claims was not shown before the commissioners of assessments, who had no other means of determining their validity than the allegations of the executors that they were

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invalid. It was held that the burden of proof was upon the executors to show that the assessment was erroneous, and that on failure to prove that the claims made against them could be successfully maintained they were not entitled to deduct their amounts. In the case before us the claim of the relators against the city of New York is indisputable and is in controversy, not as to its existence, but only as to its amount. As already stated, the legal proceedings thus far have at least established the *prima facie* value of the claim.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

EMMANUEL G. BULLARD, as Surviving Administrator of JEREMIAH CORNWELL, Deceased, with the Will Annexed, Plaintiff, v. HENRY G. BICKNELL, Defendant.

*Specific performance not decreed where the land is held adversely to the vendor—  
deed by an executor under a power of sale of land held adversely.*

A vendee cannot be compelled to specifically perform a contract for the purchase of land where, at the time fixed for performance, it is in the actual possession and occupation of persons claiming title and possession adversely to the vendor and those under whom he claims.

*Quare*, whether the provisions of the Real Property Law (Laws of 1896, chap. 547, § 225) making a grant of real property absolutely void, if the property be at the time "in the actual possession of a person claiming under a title adverse to that of the grantor," is applicable to a conveyance by an executor acting under a power of sale given by his testator's will.

SUBMISSION of a controversy, upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

*E. F. Bullard*, for the plaintiff.

*Wm. Douglas Moore*, for the defendant.

WILLARD BARTLETT, J. :

The plaintiff is the surviving administrator with the will annexed of Jeremiah Cornwell, deceased. Some of the provisions of that will were under consideration by this court in the case of *Clifford*

*v. Morrell* (22 App. Div. 470). By virtue of the power of sale then upheld, the plaintiff, on or about December 3, 1897, made a contract as such administrator to sell and convey to the defendant, and the defendant agreed to purchase upon receiving a valid conveyance thereof, an undivided ninth part of two certain lots of land at Far Rockaway, in the town of Hempstead and county of Queens, of which undivided ninth the said Jeremiah Cornwell is alleged to have been the owner in fee at the time of his death.

It appears, however, that the whole of said two lots are in the adverse possession of the grantees of Jefferson M. Levy, who about the year 1887 made improvements thereon and ousted the heirs and devisees from the possession thereof, and have ever since been in the actual occupation of the same, claiming title thereto in hostility to the said devisees of Jeremiah Cornwell and to the descendants of such devisees and to the plaintiff.

The purpose of this action by the vendor is to enforce against the vendee the specific performance of his contract to purchase the undivided ninth of the said lots.

By section 225 of the Real Property Law (Laws of 1896, chap. 547), re-enacting the similar provision of the Revised Statutes (1 R. S. 739, § 147), a grant of real property is declared to be absolutely void, "if at the time of the delivery thereof such property is in the actual possession of a person claiming under a title adverse to that of the grantor," and the entire argument of the learned counsel for the plaintiff is devoted to the proposition that this statutory provision does not apply to a sale by an executor (or an administrator with the will annexed) under a power contained in a will.

The question is an interesting one, but it cannot properly be determined in this case, for the reason that the record presents an insuperable objection to the rendition of the judgment demanded by the plaintiff, even if we should agree with him as to the non-application of the section.

We are of the opinion that the vendee cannot be compelled in equity to perform a contract for the purchase of land, where, at the time fixed for the performance of the contract, such land is actually possessed and occupied by parties claiming title and the right of possession adversely to the vendor, and those from whom the vendor's claim of title is derived.

Mr. Justice FRY, in his well-known treatise on Specific Performance, declares that the court will never compel a purchaser to take a title where the purchase would expose him to the hazard of litigation, or, as is often said, the court will not compel him to buy a lawsuit. (§ 580, m. p. 256 [Law Library, 6th series, vol. 27].) It necessarily follows that the court will not oblige him to incur the certainty of litigation, as would be the case here. A contract to sell and convey cannot be fulfilled by the conveyance of a mere right to bring ejectment for the recovery of the land. (*King v. Knapp*, 59 N. Y. 462.) In *Shriver v. Shriver* (86 N. Y. 575, 584) the Court of Appeals approves the rule laid down in *Price v. Strange* (6 Madd. 159), that a purchaser is not to take a property which he can acquire in possession only by litigation and judicial decision. "Which is equal to saying," remarks FOLGER, Ch. J., "nor one the possession of which he must thus defend." To the same effect is *Vought v. Williams* (120 N. Y. 253) where BROWN, J., says that a purchaser is not to be compelled to take property, the possession of which he may be compelled to defend by litigation. And, finally, we have a case directly in point in *Kopp v. Kopp* (48 Hun, 532), where the General Term of the first department reversed an order compelling a purchaser at a partition sale to complete his purchase. His objection was that the premises were in the possession of a tenant, not a party to the action, who was in occupation of the property under a five years' lease. This objection was held to be fatal to the right of the court to compel the purchaser to complete. "The purchaser is not bound to take the title," said VAN BRUNT, P. J., "unless he can be put into possession under the decree of sale." So, here, we think, the vendee is not bound to take the title unless the vendor can put him peaceably into undisturbed possession, which confessedly he cannot do.

For these reasons the defendant is entitled to judgment in his favor upon the agreed statement of facts.

All concurred.

Judgment for the defendant upon agreed statement of facts.

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FREDERICK KLINKER, Respondent, v. THE THIRD AVENUE RAILROAD  
COMPANY, Appellant.

*Trial—improper comments of the court in the presence of the jury—cured by the charge—mode of reviewing such comments—record relative to the denial of a motion for an adjournment.*

A statement by the court, made on the defendant's application for an adjournment of the trial of an action because of the absence of four witnesses, that the counsel for the defendant was "simply trying to fool, to hoodwink the jury, that is all," is cured, where the court, in its charge, subsequently directs the jury to disregard the whole matter, including its remark "that it was mere hoodwinking a jury to allude to absent witnesses."

Where, in the course of a trial, it is evident that the counsel for the defendant is trying to make up a record which will show that his application for an adjournment has been improperly denied, the court may properly direct that the stenographer note on the record that an inquest has once been taken in the action. *Semble*, that since the amendments to section 88 of the Code of Civil Procedure, requiring the stenographer to note remarks and comments of the judge during the trial, the method of reviewing improper utterances of the trial court in the presence of the jury is by exception.

APPEAL by the defendant, The Third Avenue Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 12th day of June, 1897, upon the verdict of a jury, reduced by stipulation from \$3,500 to \$1,800 under an order of the Trial Term entered in said clerk's office on the 10th day of June, 1897, permitting the reduction of the verdict, and also from so much of said order as allows the plaintiff to recover \$1,800.

*Nathan Ottinger*, for the appellant.

*G. Washbourne Smith*, for the respondent.

WILLARD BARTLETT, J. :

This action was brought to recover damages for personal injuries sustained by the plaintiff in consequence of a collision between a wagon which he was driving and one of the defendant's cable cars in the city of New York. The jury rendered a verdict in favor of the plaintiff in the sum of \$3,500. There was the usual motion for a new trial on the minutes, and the learned trial judge made a conditional order granting such motion, unless the plaintiff should consent to reduce the verdict to \$1,800 and enter judgment thereon

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accordingly. The plaintiff accepted this condition and the judgment now comes before us for review, and, therefore, represents an award of \$1,800, together with the costs of the action.

There was sufficient evidence of negligence on the part of the defendant to justify and require a submission of the issues of fact to the jury, and the only question which calls for further consideration on this appeal arises out of certain remarks made by the learned judge who presided at the trial, just before the case was summed up by counsel.

The last witness called in behalf of the defendant was the claim agent of the Third Avenue Railroad Company, who testified that he had with him the original report of the case — presumably meaning a report of the circumstances of the accident made to the officers of the road — and that he had a statement therein of four witnesses to the accident, who were not then present in court, because he had not had an opportunity to get them there. When asked why not, he answered: "Because I was ready, and prepared four cases in New York county for to-day." Thereupon the following colloquy occurred between court and counsel: "Defendant's counsel.—Now, I make my motion to have this case adjourned until to-morrow. The Court.—This is simply trying to fool, to hoodwink the jury, that is all. This case was on yesterday, and should have been tried. I indulged the defendant and let the case go over until to-day. This morning they were not ready, and I insisted it should be tried. Defendant's counsel.—I except to your honor's remarks. Plaintiff's counsel.—Let it be further stated on the record we had to once take an inquest before in this case. The Court.—Yes. Defendant's counsel.—I except to that statement."

Cases sometimes unfortunately arise where the judge presiding at a jury trial utters, in the presence of the jury, remarks injuriously reflecting upon the conduct of the parties or their counsel which are so unjustifiable, in view of the circumstances developed by the evidence or the proceedings upon the trial, that the utterance of such remarks is deemed legal error affording ground for a reversal, unless it clearly appears that such error was harmless. (*Cronkhite v. Dickerson*, 51 Mich. 177; *Wheeler v. Wallace*, 53 id. 355, per COOLEY, Ch. J.; *McDuff v. Detroit Evening Journal Co.*, 84 id. 1; *Furhman v. Mayor, etc., of Huntsville*, 54 Ala. 263.)

It is settled in this State that a verdict may be set aside on account of the persistence of counsel for the successful party in improperly commenting upon irrelevant matters outside the case, where it can be seen that the jury were probably influenced by the presentation of considerations in this manner which ought not to have affected their verdict. (*Williams v. B. E. R. R. Co.*, 126 N. Y. 96; *Halpern v. Nassau Electric R. R. Co.*, 16 App. Div. 90.) It is evident that a similar rule must prevail where the probability is that the verdict is due to improper comments by the trial judge. (*Daly v. Byrne*, 77 N. Y. 182, 191.) In the case cited, as in the case at bar, an exception had been taken to what the court said as to the need of delaying the trial in order to send for certain witnesses. The Court of Appeals thought that the remarks there in question did not afford a reason for interference by an appellate tribunal, but observed: "We will not say that a court might not go so far, in the utterance of matter applicable to the case, and be so gross in comment adverse to a party, as that a court of review would not be called upon to interfere with the result, on the ground that the verdict had been improperly influenced." The opinion adds that, in that case, the mode of review would not be by exception, but we think the rule in this respect has been changed by the amendments to section 83 of the Code of Civil Procedure, which now provides that the stenographer at a jury trial shall fully note each and every ruling, decision, remark or comment of the judge during the trial, when requested to do so by either party, "together with each and every exception taken to any such ruling, decision, *remark or comment*," by or on behalf of any party to the action.

The imputation put upon defendant's counsel by the learned trial judge, when he denounced him as simply trying to fool and hoodwink the jury by his motion for an adjournment, was wholly without justification, from anything which appears in the record before us. Any lawyer familiar with jury trials appreciates the extent to which the demeanor, manner and language of the presiding judge are observed by jurors, with reference to their own guidance in coming to a just and proper conclusion upon the facts, and it can hardly be doubted that such an expression of opinion, characterizing the motives of counsel as designed to mislead the jury in this very case, would have influenced them adversely, both to the lawyer and his

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client, unless the objectionable remarks had been withdrawn from their consideration before the jury retired to deliberate upon their verdict.

It is plain, however, that the learned judge realized the mistake which he had made, and frankly and fairly endeavored to correct it at the conclusion of the charge. The court instructed the jury, in accordance with a request of defendant's counsel, that the verdict must be in favor of the defendant if the collision was the result of mere accident, and then proceeded to say: "With regard to the proof about other evidence lacking, we have tried the case on the testimony that is here alone, and whatever has been said in regard to the matter by counsel on either side, or by myself, is withdrawn entirely from your consideration, including the remark that it was mere hoodwinking a jury to allude to absent witnesses. That does not decide this case; you decide it upon the evidence in the case, without regard to what I think about it, or counsel, or any one else."

We are of the opinion that this statement operated to remedy the evil occasioned by the objectionable remark of the judge. It has repeatedly been held that the vice of receiving inadmissible evidence may be cured by the action of the trial judge in subsequently striking it out and directing the jury to disregard it. (*Chesebrough v. Conover*, 140 N. Y. 382, 389.) We do not see why the same curative effect may not be assigned to similar efforts to do away with the damage caused by unfortunate judicial comments.

There was no error in the direction of the court that it should be stated on the record that an inquest had been taken once before in this case. This fact, it is true, had no bearing upon the issues on trial before the jury, but the defendant's counsel was evidently trying to make up a record to show that his application for an adjournment ought to have been granted; and, under the circumstances, it was quite proper for the court to take cognizance of the fact that there had been an inquest, after which the defendant's default had been opened, and quite proper, also, that the stenographer should note this fact as bearing upon the proper disposition of the motion for a postponement.

The judgment should be affirmed.

Judgment and order unanimously affirmed, with costs.

In the Matter of the Application and Petition of MICHAEL T. DALY, as Commissioner of Public Works of the City of New York, for and on Behalf of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, under Chapter 189 of the Laws of 1893, to Acquire Certain Real Estate for the Purpose of Providing for the Sanitary Protection of the Sources of the Water Supply of the City of New York.

Mt. KISCO, WESTCHESTER COUNTY, Parcel No. 29.

WILLIAM I. HALSTEAD, Appellant; THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

*Condemnation commissioners may form an opinion of value from a personal inspection — variance from the values sworn to.*

Commissioners appointed in condemnation proceedings may properly be influenced in their appraisal by the conclusions which they have reached from their personal inspection and examination of the premises to be taken.

An award of \$2,669.29, which was \$367.86 less than the highest valuation and \$72 less than the lowest valuation given by witnesses called by the municipality seeking to acquire the land, it was considered, on an appeal therefrom by the owner of the land taken, should not be set aside.

APPEAL by William I. Halstead from the appraisal and report of commissioners appointed in this proceeding, filed in the office of the clerk of the county of Westchester on the 31st day of July, 1895, and also from an order made at the Orange Special Term and entered in the office of the clerk of the county of Westchester on the 7th day of October, 1895, confirming said report.

A. J. Adams, for the appellant.

H. T. Dykman, for the respondent, petitioner.

WILLARD BARTLETT, J. :

The land taken from the appellant in this proceeding is a lot about 126 feet wide and 200 feet deep on Moger avenue, in the village of Mount Kisco, in the county of Westchester. The only building upon the premises was a barn. The amount awarded by the commissioners for the entire property, comprising the land and this building, was \$2,669.29.

The only ground on which this award is attacked is its alleged inadequacy. It appears to be \$367.36 less than the highest valuation given by the witnesses called in behalf of the city of New York, and \$72 less than the lowest valuation given by such witnesses. We do not think that the difference in either case is sufficient to justify us in setting aside the report of the commissioners. The rule is too well settled to require the citation of authority to support it, that these officers have the right to be influenced, in the appraisal which they make, by their own inspection and examination of the property to be taken; and there is nothing to show that the result reached in this case was not due to a proper exercise of their functions in this respect.

Our attention is also called to the award made by the same commissioners for parcel No. 27 at Mount Kisco, which is said to be property near this, where the award was four times the amount which they allowed per front foot for the parcel in controversy here. Such proof as the record contains, however, as to the comparative character of the two pieces of land, indicates that the higher valuation placed upon parcel No. 27 was warranted by the presence thereon of a railroad switch and by the somewhat superior situation of the lot; so that it is impossible for us to assert that the difference shows the present award to be inadequate.

The order appealed from must be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRED C. COCHEU,  
Appellant, v. JACOB G. DETTMER as Park Commissioner of the  
City of Brooklyn, Respondent.

*Brooklyn — its park commissioner has no power to maintain an action to prevent the maintenance of a steam railroad on Fort Hamilton parkway — remedy where a railroad is operated in defiance of law.*

The park commissioner of the city of Brooklyn has no authority, under chapter 665 of the Laws of 1892, placing under his exclusive charge and management Fort Hamilton parkway, now in the city of Brooklyn, but formerly in the town of New Utrecht, to take proceedings to prevent the further maintenance and

operation over the parkway, at grade, of a steam railroad which has been operated in the same manner upon such parkway for many years, in alleged violation of chapter 609 of 1871, as amended by chapter 551 of 1875, as the statute in question gives him no express or implied authority in the matter, nor does it transfer to him the right conferred on town highway commissioners by section 15 of the Highway Law (Laws of 1890, chap. 568) to enforce the performance of any duty enjoined upon any person or corporation in respect to any town highway. *Semble*, that if the railroad corporation is occupying and obstructing the parkway in defiance of the law, the remedy is by indictment for maintaining a public nuisance, or by an action in equity, by the Attorney-General, to restrain the continuance of the nuisance and abate it, or by an action by an individual, who has sustained a special or peculiar injury from the obstruction, in his own name, for an injunction.

APPEAL by the relator, Fred C. Cocheu, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 1st day of December, 1897, denying his motion for a peremptory writ of mandamus requiring the respondent to take such proceedings as would result in preventing the Sea Beach Railroad Company from maintaining its steam railroad on the same grade as the Fort Hamilton parkway, and operating its cars on the same grade.

*James C. Church*, for the appellant.

*Almet F. Jenks*, for the respondent.

*George W. Wingate*, for the Sea Beach Railroad Company.

WILLARD BARTLETT, J. :

The Sea Beach Railroad Company, at the time this application was made, had been constructed and was operated by locomotive steam power upon Fort Hamilton parkway at grade, in that part of the city of Brooklyn which formerly constituted the town of New Utrecht. The parkway was formerly known as Franklin avenue, and the appellant insists that the construction and operation of this railway upon it at grade were and are forbidden by chapter 609 of the Laws of 1871, as amended by chapter 551 of the Laws of 1875. The purpose of the present application was to compel the park commissioner of the city of Brooklyn to take proceedings to prevent the further maintenance and operation of the said steam railroad at grade over said Fort Hamilton parkway. The contention of the appellant

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that such is the duty of the commissioner is based upon the supposed effect of chapter 665 of the Laws of 1892, which declared that the highway in question from and after the passage of that act should be "under the exclusive charge and management of the park commissioner of the city of Brooklyn," and further provided that the said commissioner should "make and enforce proper rules and regulations for the public use thereof."

This enactment was not broad enough to empower the park commissioner to institute legal proceedings for the removal of the railroad which was then upon the highway, and, as the papers show, had been there many years. No authority to sue is conferred upon him by the express language of the statute or by implication. It was suggested upon the oral argument that he had acquired the powers which the highway commissioners of the town of New Utrecht previously possessed under section 15 of the Highway Law (Laws of 1890, chap. 568). That section reads as follows:

"The commissioners of highways may bring an action in the name of the town, against any person or corporation, to sustain the rights of the public in and to any highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto, and to recover any damages sustained or suffered or expenses incurred by such town, in consequence of any act or omission of any such person or corporation, in violation of any law or contract in relation to such highway."

We can find in the act of 1892, however, no evidence of any intent to transfer to the park commissioner the right to sue for injuries to the highways, which belongs to the highway commissioners in towns generally throughout the State. In the absence of a statute conferring it those officers themselves would have no such right. (*Cornell v. Butternutts Co.*, 25 Wend. 365.) It is not to be assumed that the power was devolved upon the park commissioner of the city of Brooklyn, in the absence of clear language manifesting that such was the legislative intent.

For the purposes of this appeal it is enough to determine that the respondent does not appear to possess the requisite authority to institute the legal proceedings desired by the appellant. If it be true, however, as the appellant contends, that the Sea Beach Railroad



Company is occupying and thereby obstructing Fort Hamilton avenue, in defiance to the special statutes relating to that highway, a remedy for such public nuisance may readily be found by obtaining an indictment against the corporation, or procuring the Attorney-General to bring an appropriate suit in equity to restrain its continuance and abate it. (Penal Code, § 385, subd. 3; *People v. Vanderbilt*, 28 N. Y. 396; *Cook v. Mayor and Corporation of Bath*, L. R. [6 Eq. Cas.] 177.) Of course, if the appellant can show that he himself is suffering any special and peculiar injury from the obstruction, he may also maintain an action for an injunction in his own name.

The order appealed from should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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MARTIN D. VAN WIE, Respondent, v. THE CITY OF MOUNT VERNON,  
Appellant.

*Negligence — collision, by reason of a horse becoming frightened by a trolley car, with a city lamp post six inches inside the curb line — liability of the city — contributory negligence.*

In an action brought to recover damages resulting from the alleged negligence of the defendant, a municipal corporation, it appeared that while the plaintiff was driving a horse, which was somewhat restive when passing cars, along a street in the defendant city upon which trolley cars were operated, the horse became frightened by the loud and sudden ringing of the bell on an approaching car, and that his consequent movement brought the hind wheel on one side and the body of the wagon on the other side of a lamp post standing upon a street corner six inches inside the curb line, by reason of which the wheel was torn from the wagon and the plaintiff was injured.

*Held*, that the plaintiff was not guilty of contributory negligence, as matter of law, in driving the horse upon the street or in concluding to meet and pass the car;

That the lamp post having been erected in the prosecution of a public improvement which the city had power to authorize, the determination of the position in which it should be placed was within the discretion of the city, and that where such discretion was exercised in good faith the city could not be held liable for a failure to furnish more complete protection.

*Semble*, that even if the defendant's liability might be treated as one of fact, negligence could not be predicated of the manner in which the lamp post was set.

APPEAL by the defendant, The City of Mount Vernon, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 18th day of October, 1897, upon the verdict of a jury, and also from an order bearing date the 9th day of October, 1897, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

*William J. Marshall*, for the appellant.

*Charles H. Noxon*, for the respondent.

HATCH, J.:

This action is brought to recover damages for injuries claimed to have been received through the negligent act of the defendant. There is little if any dispute in the evidence, and the case may be disposed of upon a well-settled principle of law. The plaintiff was driving through Third street, in the city of Mount Vernon, with a horse attached to a buggy, in which was seated his wife and himself. Trolley cars ran upon this street, and, as he approached the corner of Third and Haight streets, he observed a trolley car approaching. The horse was a high-spirited animal, and somewhat restive when passing the cars. As the car came near to the plaintiff it sounded its bell loudly, and the movements of the horse brought the hind wheel and the box of the buggy on either side of a lamp post standing upon the corner, which resulted in tearing the wheel from the buggy, throwing the occupants upon the street, and the plaintiff sustained the injuries of which he now complains. Although the horse was somewhat spirited, shied at the trolley cars and ran away upon this occasion, we do not think that contributory negligence of the plaintiff can be affirmed as matter of law, either in driving the horse or in concluding to meet and pass the car under the circumstances developed by the trial. The plaintiff had the horse under control, and there was nothing to lead a person reasonably prudent and careful to think that he would not continue to be, or that he would not have been, controlled, had he not come in contact with the lamp post. (*Ring v. City of Cohoes*, 77 N. Y. 83.)

The jury were authorized to say that what caused the horse to make the movement which he did was the sudden and loud ringing

of the bell upon the car. The court was, therefore, so far correct, in holding that the question of contributory negligence was for the jury.

Upon the question of the defendant's negligence, however, we think that the judgment cannot be upheld. The only evidence upon which the respondent claims that negligence of the city can be predicated is in the maintenance of the lamp post upon the corner. This post was placed by the gas company having a contract with the defendant for lighting its streets, as directed by the defendant and in pursuance of a resolution by its common council. It appears that it was placed in the same relative position to the curb of the street as all of the other posts upon the street, and stood six inches inside the curb line. The setting of this post, therefore, was in the prosecution of a public improvement which the municipality had power to authorize. The manner of its exercise was committed to municipal discretion, and it was for it to say to what extent it would guard against possible accidents in placing the post. It may not be punished for not giving more complete protection to the public than it determines upon, when it acts in good faith and is not controlled by some express statutory mandate requiring it to do otherwise. (*Urquhart v. City of Ogdensburg*, 91 N. Y. 67; *Paine v. Village of Delhi*, 116 id. 224.) The only additional requirement is that, in the construction of the work and thereafter keeping the same in repair, due care shall be observed. There is no room for finding in this case that this accident occurred by reason of the structure having become out of repair. This rule necessarily prevents speculation, by proof, as to whether the post should be set closer to the walk or nearer to the curb. Negligence may not be based on any such conjectures. (*Urquhart v. City of Ogdensburg*, *supra*; *Mills v. City of Brooklyn*, 32 N. Y. 489-496.) If it might be considered a question of fact, negligence could not be predicated of the manner in which this post was set. (*Dubois v. City of Kingston*, 102 N. Y. 219.) The fact that no light was placed upon the post until 1897 is of no consequence. The city was authorized by its charter (Laws of 1892, chap. 182, § 166, subd. 29) to prosecute the work, and it might, in the proper exercise of its powers, anticipate the growth of the city and its future needs and make reasonable provision therefor.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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WILLIAM L. STIMPER, an Infant, by his Guardian ad Litem, HEINRICH STIMPER, Appellant, v. THE FUCHS AND LANG MANUFACTURING COMPANY, Respondent.

*Negligence — a boy injured while assisting, contrary to the terms of his employment, in the use of a machine — failure of a foreman to secure loose parts of a machine — contributory negligence.*

A boy fifteen years of age was employed about a machine shop under an agreement between the proprietor of the machine shop and the boy's father that the boy was to be employed only in cleaning the shop, running errands and drilling holes, and was not to be placed at work upon any machine without the consent of his father. While assisting, under the direction of his employer's foreman, without the consent of his father, in operating a hydraulic pump, he was injured by the fall of some of the parts, which had become loosened, to the knowledge of the foreman, but which might have been secured by the use of a rope.

In an action brought by the boy against the proprietor of the machine shop to recover for the injuries thus sustained,

*Held*, that the jury were authorized to find that the defendant was guilty of negligence in permitting or directing the plaintiff to work about the machine, and also because of the foreman's neglect to properly secure the machine and protect the plaintiff;

That if there was any question of contributory negligence, it was one to be decided by the jury.

APPEAL by the plaintiff, William L. Stimper, by his guardian *ad litem*, Heinrich Stimper, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 3d day of April, 1897, upon the dismissal of his complaint by direction of the court after a trial at the Kings County Trial Term.

The action was brought to recover damages for personal injuries to the plaintiff resulting from the alleged negligence of the defendant.

*Henry M. Dater* [*George F. Elliott* and *Jay S. Jones* with him on the brief], for the appellant.

*Frank V. Johnson* [*Robert Thorne* with him on the brief], for the respondent.

HATCH, J. :

The plaintiff was an infant of about the age of fifteen years. He entered the machine shop of the defendant for the purpose of learning the trade of a machinist and had been at work for about six weeks, when the accident happened which forms the support for this action. The evidence given upon the trial would have authorized the jury to find that the plaintiff was not to be set at work upon or about any machine in the shop until such time as such employment would be deemed proper by his father, and that he entered upon his employment with that understanding, and that his employment upon or about the machines had not been authorized by his father at the time when the accident happened. According to the testimony of the father the plaintiff was simply to be employed in cleaning up the shop, running errands and drilling holes. This arrangement was assented to by the defendant, and it was upon this understanding that the employment began.

The duties thus specified, it may be assumed, involved no danger to life or limb. Instead, however, of confining his employment to these duties, the evidence establishes that he was directed by the defendant's foreman to assist in operating a lever about an hydraulic pump, and that while so engaged the pump fell and some of the pieces came in contact with plaintiff's head, inflicting a wound, and also fell upon one foot, injuring it severely. The evidence clearly justified a finding that the pump fell apart through some inherent defect or by reason of the negligence of the foreman in giving a direction to the plaintiff about the management of the lever, and also in failing to observe proper precautions to secure the parts of the pump from falling when the pressure was reversed or increased. The evidence in detail is quite short. The plaintiff was engaged in cutting paper, which was placed in the machine and pressure applied upon it by means of the pump. He was called by a fellow-workman to assist at the lever and responded to the call. While so employed he was directed to let the pressure down, and as he did so one of the irons

composing the pump or machine fell out and came in close proximity to plaintiff, but did not touch him. The workman then desisted from his operations and sent for the foreman, who came and gave directions about the machine and the work. The foreman called the plaintiff to again come to the lever, and he and a helper worked it. The foreman was arranging a part of the machine which did not exactly fit, and gave the direction, "Just pump it a couple of times more," which plaintiff and the helper did, and the machine gave away, inflicting the injury of which complaint is made. Upon these facts the jury were clearly authorized to find that the defendant was guilty of a negligent act in permitting or directing the plaintiff to work about this machine. (*Railroad Co. v. Fort*, 84 U. S. 553; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 210.)

The evidence also disclosed that the machine could have been secured by a rope when paper was being placed therein, which would have secured the parts from falling. The declaration of the foreman after the accident was: "We were too lazy to go down stairs to get the rope, and it fell down; we ought to have a rope. \* \* \* If there was a rope, it wouldn't happen." The failure of the foreman to properly secure the machine and protect the plaintiff was the failure of the master, and, for negligence in this regard, the defendant was clearly responsible. (*McGovern v. C. V. R. R. Co.*, 123 N. Y. 280.)

There was no question of contributory negligence in the case; at least, if there was, it was for the jury. The plaintiff was clearly entitled to have his case submitted to the jury, and it was error to dismiss his complaint.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

ANNIE PATTERSON, Respondent, v. THE WESTCHESTER ELECTRIC  
RAILWAY COMPANY, Appellant.

*Negligence — action for personal injuries based upon the fact that the defendant suddenly started its car — the plaintiff cannot change her position on the trial — improper refusal to charge.*

Where the only issue, in an action brought to recover damages for personal injuries resulting to the plaintiff from the alleged negligence of the defendant, an electric railroad corporation, is whether the defendant suddenly started its car after having stopped it in order to permit the plaintiff to alight, the defendant is entitled to have the court charge the jury that, if they believe that the plaintiff stepped from the car while it was in motion, their verdict must be for the defendant; as, although it is not necessarily a negligent act to alight from a moving car, the plaintiff, having taken the position that the accident occurred from the sudden starting of the car after it had stopped to enable her to alight, should not be permitted, in order to establish a liability on the part of the defendant, to shift her claim and to take another position, of which she had given the defendant no notice.

APPEAL by the defendant, The Westchester Electric Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 29th day of May, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 14th day of July, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Nathan Ottinger*, for the appellant.

*Isaac N. Mills*, for the respondent.

HATCH, J. :

The action is to recover damages for negligence. The averments of the complaint, upon which the action is predicated, are in substance that the defendant stopped its car for the plaintiff to alight therefrom, and that, while she was in the act of alighting, the defendant carelessly and negligently caused the car to suddenly start with a jerk, without any warning to the plaintiff, and that by reason of such act she sustained the injuries of which complaint is made. The proof upon the part of the plaintiff tended to sustain the allegations of her complaint and to show that the car had come to a standstill at the time the plaintiff attempted to alight. Upon these

averments and the proof, the only issue of negligence which the defendant was called upon to meet consisted in the starting of the car after it had stopped for the purpose of permitting the plaintiff to alight therefrom. The evidence given upon the part of the defendant was directed to this issue, and this alone. Its proof tended to establish that in fact the car did not stop, but that the plaintiff attempted to alight while the car was in motion, and that such injuries as she sustained were the result of such act, and were not occasioned by reason of any sudden starting of the car. In this state of the issue the defendant requested the court to charge that if the jury believed "that this plaintiff stepped from the car while the same was in motion, your verdict must be for the defendant." The court refused so to charge, and the defendant's counsel duly excepted. The defendant was entitled to have the charge made as requested. It bore directly upon the only issue of negligence in the case, and if it was true that the plaintiff did step from the car while it was in motion, such act would furnish a complete answer to the case which she presented to support her cause of action. (*Pierce v. Met. R. Co.*, 21 App. Div. 427.) The force of this position is sought to be avoided by the claim that it is not necessarily an act of negligence to alight from a moving car. It is quite true that the attendant circumstances of a given act may be such as to exonerate a person from the charge of negligence, and this rule may be applied, and has been, to persons alighting from or boarding a moving car. But such considerations have no application to the present case, for the reason that the whole claim of the plaintiff must stand, if it stand at all, upon the fact that the car was stationary when she made the attempt to alight, and was suddenly started before she could remove herself therefrom. Having selected this position she cannot be permitted to shift to another ground, of which she has given the defendant no notice, in order to establish liability. The effect of such a change would be to authorize a recovery upon evidence which disproves the cause of action averred in the complaint, and which is opposed to her proof. Many authorities condemn the plaintiff's claim. (*Caven v. City of Troy*, 15 App. Div. 163; *Neudecker v. Kohlberg*, 81 N. Y. 296; *Southwick v. First Nat. Bank*, 84 id. 420.)



For this error the judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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EBENEZER J. PURDY, Appellant, v. JOHN A. COLLYER and ELIZABETH JANE PURDY, Respondents.

*Oral agreement by a vendee, in consideration of a deed of land, to discharge mortgages on other land of the vendor — Statute of Frauds — when an action is for specific performance and not to remove a cloud on title — Statute of Limitations — the plaintiff in an action to determine claims to real estate must show possession.*

An oral agreement, made by the vendee of premises, that as part of the purchase price she will pay off and discharge mortgages upon other property owned by the vendor, is not void under the Statute of Frauds.

An action by the vendor to compel the vendee, who, instead of satisfying the mortgages, has taken assignments of them to herself, to satisfy the mortgages or to reconvey to the vendor the premises conveyed to her by him, is not an action to remove a cloud upon title, against which the Statute of Limitations never runs, but is an action for the specific performance of the agreement, and, as such, is governed by the ten years' Statute of Limitations.

Where the complaint in such an action expressly alleges that the fee of the premises upon which the mortgages were a lien has been acquired by the city of New York, the action cannot be sustained as one for the determination of conflicting claims to real property, as the plaintiff does not show possession in himself as required by sections 1638 and 1639 of the Code of Civil Procedure.

APPEAL by the plaintiff, Ebenezer J. Purdy, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Westchester on the 3d day of July, 1897, upon the decision of the court rendered after a trial at the Westchester County Special Term dismissing his complaint upon the merits.

The complaint in this action alleged that the plaintiff conveyed certain premises to the defendant Purdy through the defendant Collyer, upon her agreement that, as part of the purchase price she would pay off and discharge two mortgages upon certain other prop-

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erty owned by the plaintiff; that the defendant Purdy had, in violation of the agreement, taken assignments of the two mortgages to herself, and had refused to discharge them; that the property upon which the mortgages were a lien had been taken by the city of New York in condemnation proceedings, and that the defendant Purdy had filed a claim against the award for the amount of the mortgages. The complaint demanded judgment that the defendant Elizabeth Jane Purdy be directed to deliver to the plaintiff the mortgages to be canceled, or that she be compelled to reconvey to the plaintiff the premises conveyed to her, and that during the pendency of the action she be restrained from transferring the said mortgages or the said premises, and ended with a general prayer for relief.

The defenses interposed were, among other things, that the alleged agreement was not in writing as required by the Statute of Frauds, and that the action was barred by the ten-year Statute of Limitations.

*A. J. Adams*, for the appellant.

*Isaac N. Mills*, for the respondents.

HATCH, J.:

We think the court below was clearly right in its holding that the Statute of Frauds did not constitute a defense to the maintenance of the action. The appellant insists, however, that the court was wrong in ruling that the ten-year Statute of Limitations was a bar to the action. His contention in this regard is based upon the claim that the mortgages constitute a cloud upon his title to the land, and that the Statute of Limitations never runs against an action to remove a cloud upon the title. The appellant is undoubtedly right in his statement that the Statute of Limitations does not run against such an action. (*Miner v. Beekman*, 50 N. Y. 337; *De Forest v. Walters*, 153 id. 229.) But this rule of law is not available to the appellant in this action for the reason that his complaint is not framed upon any such theory. The averments of the complaint constitute the action one for the specific performance of the contract entered into by and between the parties. The most liberal construction cannot construe it into anything else. Such action is barred by the statute. (*Peters v. Delaplaine*, 49 N. Y. 362; *Plet v. Willson*, 134 id. 139; *Kelly v. Potter*, 16 N. Y. Supp. 446.)

Aside from this, there is another and complete answer to this claim. The specific averment of the complaint is that the mayor, aldermen and commonalty of the city of New York have acquired the fee of the property upon which the mortgages are a lien. In actions for the determination of conflicting claims to real property the plaintiff must show possession in himself in order to maintain the action. (Code Civ. Proc. §§ 1638, 1639; Pom. Eq. Juris. § 1396 *et seq.*) Here, by express averment, the plaintiff shows that he has no interest in or title to the property. It may be that the plaintiff has standing to contest the right to the fund created by the appropriation of the land by the city, but we can find no ground upon which he is entitled to relief in this action.

The judgment should, therefore, be affirmed.

All concurred.

Judgment affirmed, with costs.

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PATRICK FRANCIS, Respondent, v. GEORGE C. TILYOU, Appellant.

*Malicious prosecution — when the question of probable cause is for the court — alteration of the charge after the arrest — there must be probable cause for preferring the new charge — notice of appeal from an order not entered.*

Where, in an action brought to recover damages for an alleged malicious prosecution, there is no dispute concerning the facts upon which the defendant acted in causing the arrest of the plaintiff, the question of probable cause is for the court.

The fact that the defendant was informed by his watchman that the plaintiff had made two attempts to break into the defendant's bath houses constitutes probable cause for the defendant's making a complaint and having the plaintiff arrested.

Where, however, the defendant, after the plaintiff's arrest, upon the suggestion of the magistrate that the charge of burglary, or of attempted burglary, is too severe, alters the charge to one of vagrancy, the subsequent detention and trial of the plaintiff upon the charge of vagrancy can be justified only by proof that the plaintiff was, as matter of fact, guilty of that offense; and in case the proof as to whether the plaintiff was guilty of vagrancy be inconclusive and conflicting and he be finally acquitted, the jury in the action for malicious prosecution are justified in finding that the defendant did not have probable cause for preferring the charge of vagrancy, and a motion to dismiss the complaint is properly denied.

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A notice of appeal, dated April 3, 1897, stating that the defendant appeals "from the order and judgment heretofore made and entered \* \* \* on the 8th day of March, 1897," is insufficient to effect an appeal from an order denying a motion for a new trial where the formal order was not entered until August, 1897, the clerk's minutes reciting that it was made upon the 5th day of March, 1897

APPEAL by the defendant, George C. Tilyou, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 8th day of March, 1897, upon the verdict of a jury.

*William Hughes*, for the appellant.

*Henry A. Powell*, for the respondent.

HATCH, J. :

The notice of appeal states that the appellant appeals "from the order and judgment heretofore made and entered in the office of the clerk of the county of Kings on the 8th day of March, 1897, \* \* \* and from each and every part of said order and judgment." The notice is dated April 3, 1897. At that time no formal order denying a motion for a new trial had been entered, and it was not entered, as disclosed by the record, until August, 1897. The clerk's minutes, which may be considered as the record of an order denying a motion for a new trial, recite that such motion was made and denied, but this was upon the 5th day of March, 1897. There was also another order entered in the case substituting attorneys on the 28th day of January, 1897. The notice of appeal is, therefore, insufficient as an appeal from the order denying a motion for a new trial. It does not specify any such order, and the designation of a particular date shows that no such order was of record as of that date. The notice of appeal must be sufficiently definite and certain to designate the particular order appealed from, and for that purpose should state its character. This notice is essentially defective in that it fails to designate with sufficient particularity the order from which an appeal is attempted to be taken. There being no appeal from the order denying a motion for a new trial, there is no basis upon which a review of the facts may be had in this court. (*Thurber v. The Harlem B., M. & F. R. R. Co.*, 60 N. Y. 326.)

There was, however, a motion made at the close of the case to dismiss the complaint, upon the ground that the defendant had reasonable and probable cause in procuring the arrest of the plaintiff,

and also an exception taken to the charge of the court in its statement that the defendant must have reasonable and probable cause to believe that the plaintiff was guilty of vagrancy. The case is, therefore, so far before us as to require the determination as to whether the proof given upon the trial was sufficient to authorize the submission of these questions to the jury. The action is brought to recover damages for malicious prosecution in causing the arrest of the plaintiff. The case disclosed, and this without dispute, that the defendant was informed by the watchman employed by him at his bath houses that the plaintiff had attempted to break into the same, and that thereupon, acting upon such information, he made a complaint to the magistrate and procured the arrest of the plaintiff without any warrant being issued for his apprehension. The information communicated by the watchman was, in substance, that the plaintiff had made two attempts to break into the bath houses, and while the fact of the attempt was disputed by the plaintiff, there is no contradiction of the fact that the defendant was so informed, and immediately acted upon such information. We are of opinion that this information was sufficient upon which the defendant might safely act in making the complaint and procuring the arrest of the person of the plaintiff, although no warrant had been issued at the time the arrest was made. We have recently had occasion to reiterate the doctrine of what constitutes probable cause. (*George v. Johnson*, 25 App. Div. 125.) As there was no dispute concerning the facts upon which the defendant acted in causing the arrest and in making the complaint, the question of probable cause was for the court (*Anderson v. How*, 116 N. Y. 336), and upon the facts as developed in this case bearing upon that subject we think there was sufficient to justify the action of the defendant and exonerate him from liability therefor.

If this were all of the case, it would follow that error was committed in refusing to dismiss upon the defendant's motion. But it further appears that after the complaint was made and the arrest was had, the justice stated to the defendant, as testified to by him: " 'George, this is a serious charge.' I says, 'I don't see how you can make anything else out of it only burglary or attempted burglary.' 'Well,' he says, 'it is pretty severe; I think vagrancy is about the proper thing.' \* \* \* He said I had better make it vagrancy —

then he drew up a vagrancy complaint and I signed it, and the case was set down for trial." It clearly appears from the testimony that while the arrest may be justified, the charge of vagrancy may not be disposed of under the evidence as a question of law, but upon the proof in the case such question became one of fact. The plaintiff, after the charge of vagrancy was made, was detained and held in custody upon such charge and that alone, and whatever justification there might have been for the arrest on the charge of burglary or attempted burglary could not avail to aid the defendant in support of the subsequent specific charge which was made. When the charge of burglary or attempted burglary was abandoned, the plaintiff was no longer held for that, and his subsequent detention and trial could only be justified upon the fact that he was guilty of the offense of vagrancy. As to whether or not he was guilty of this offense the proof upon the trial was inconclusive and conflicting, the plaintiff was acquitted of the charge, and the court was right in charging the jury as it did upon this subject, and was, for the same reason, also justified in denying the motion to dismiss the complaint. Upon the latter charge the question was for the jury, and they having found a verdict in plaintiff's favor we are not only without authority to disturb it, but if we possessed authority to review the facts, should be constrained to hold that there was sufficient evidence for such purpose.

The judgment should be affirmed.

Judgment unanimously affirmed, with costs.

BIRDSALL, WAITE & PERRY MANUFACTURING COMPANY and Others,  
Appellants, v. GEORGE SCHWARZ and BARBARA SCHWARZ, Respondents, Impleaded with Others.

*Conveyance by a husband to his wife in consideration of a loan of moneys which had been paid by the husband to the wife for services.*

*Semble*, that where a husband at a time when he is perfectly solvent agrees to pay his wife a certain sum from week to week for services rendered by her in a business conducted by the husband, the money, when paid to the wife, becomes part of her separate estate, and the loan of it to her husband furnishes a sufficient consideration for conveyances subsequently made in contemplation of insolvency by the husband to the wife.

APPEAL by the plaintiffs, the Birdsall, Waite & Perry Manufacturing Company and others, from a judgment of the Supreme Court in favor of the defendants George Schwarz and Barbara Schwarz, entered in the office of the clerk of the county of Kings on the 24th day of May, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term dismissing the complaint upon the merits as to said defendants.

*Louis Marshall*, for the appellants.

*William W. Butcher*, for the respondents.

HATCH, J. :

This action is brought to set aside certain deeds from George Schwarz to his wife, Barbara Schwarz, it being claimed that they were executed and delivered in fraud of the rights of creditors. This case has been before this court upon another appeal. (*Birdsall Mfg. Co. v. Schwarz*, 3 App. Div. 298.) We then held that the judgment creditors had sufficient standing to maintain an action to set aside the deeds, and reversed the judgment which dismissed the plaintiffs' complaint upon the ground that the right of action was in the assignee of the Brooklyn Carriage and Harness Company, of which firm George Schwarz was a member, the assignment having been made by that firm. In the disposition of that case, however, we said that : " A court would find some evidence to sustain a finding that there existed a *bona fide* debt of some amount owing by George Schwarz to his wife." Upon the present trial this question was fully litigated, and the court dismissed the complaint, holding that the conveyances were made in good faith and without intent on the part of either defendant to hinder, delay or defraud the plaintiffs or the creditors of George Schwarz.

The plaintiffs offered no testimony beyond the record of the judgment, the assignment and certain conveyances from various parties to George Schwarz, and by George Schwarz to his wife, except that the plaintiffs called the defendant George Schwarz and examined him as a witness upon the trial. The testimony of George Schwarz tended to establish that he and his wife carried on a tailoring business as partners, of the profits of which he received two-thirds and she received one-third, and that as a product of that business

Barbara saved about the sum of \$7,000, and that at various times between 1884 and 1890 she loaned such sum to George Schwarz, and that at the time of the execution and delivery of the conveyances sought to be set aside he was indebted to her for such moneys in the sum of \$6,700. It is not claimed that if this indebtedness in fact existed, the value of the real estate conveyed was greater than this sum. The only point in contest between the parties related to the indebtedness of the husband to the wife. Upon the former trial evidence was given by Schwarz and his wife tending to establish that the relation which existed between them was that of employer and employee, and that she received the sum of eight dollars a week for her services, and, therefore, the claim is made that an agreement to pay the wife for the services was in fraud of the rights of creditors and would not furnish a sufficient consideration to uphold the conveyances, and this is undoubtedly true within the doctrine of *Coleman v. Burr* (93 N. Y. 17). This case, however, differs from the facts of that case, in that here, if such was the arrangement, the money was paid to the wife at a time when George Schwarz was perfectly solvent, and from week to week, as the wife earned it. The service added value to the estate of the husband, and it having been paid to her under such circumstances it became a part of her separate estate, of which she had good title; and the loan of that money to George Schwarz would furnish a sufficient consideration for the conveyances. (*Commercial Bank v. Bolton*, 87 Hun, 547.) Upon the present trial, however, the testimony in this respect is very much changed, and the claim is put forth by both that the arrangement existing between them was that of a partnership, the profits to be divided in the proportion heretofore stated. This claim is, in some respects, in antagonism to the attitude of the parties and their testimony upon the former trial; but there was no proof, except such contradictions as are found in the two versions, which established that any other or different relation than that of a partnership existed between the parties. There is no doubt in my mind but that Barbara Schwarz had some money of her own which she, from time to time, loaned to her husband; that the same had not been repaid, and constituted, at the time of the execution and delivery of the deeds, a valid obligation



in her favor, which the husband was authorized to discharge, and of which no creditor could complain. The only difficulty that arises is as to the amount of money which she loaned. She had a bank account which she kept in her name, showing the deposits of various sums of money, but not sufficient to reach the amount of the sum claimed to have been loaned and which furnished the consideration for the deeds. It also appeared that this bank account was subsequently changed from her individual name to that of George and Barbara Schwarz, and that deposits of money continued to be made therein. It is claimed, however, by the defendants that this change did not represent any money belonging to the husband which was deposited in the account, but that the change was made at the suggestion of the attorney of the bank in order to obviate any difficulty which might arise in the event of the death of Barbara. Upon the whole case it is evident that the trial court had before it evidence from which it was authorized to find that the consideration for the conveyances was fairly owing from the husband to the wife, and that the conveyances were made to discharge that obligation; and while there are numerous contradictions in the testimony and many suspicious circumstances in the case, and the court would have been authorized to find that at least some part of the consideration was not owing, and that the conveyances were made for the purpose of preventing the creditors of George Schwarz from reaching the property, yet such testimony is not so far preponderating as to require us to interfere with the determination of this question by the trial court. On the contrary, we find sufficient in the case which tends to support the conclusion which was reached, and, therefore, conclude that the judgment should be affirmed.

All concurred, except BARTLETT, J., not sitting.

Judgment affirmed, with costs.

EVELYN VAN GIESON, Respondent, v. IRA T. VAN GIESON,  
Appellant.

*Order granting counsel fees and alimony at the same rate as the husband had previously agreed to pay the wife.*

Where an action brought by a wife against her husband for a separation is discontinued upon the execution of a sealed agreement, by the terms of which the husband agrees to pay his wife a fixed sum per week for her maintenance as well as certain counsel fees, and that, upon his default, she may recommence the action for a separation and petition any court of competent jurisdiction for alimony and counsel fees, and the wife, upon the husband's failure to perform the agreement, begins another action for a separation, an order made therein requiring the husband to pay alimony and counsel fees at substantially the same rate as he had agreed to pay will not be disturbed.

APPEAL by the defendant, Ira T. Van Gieson, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 8th day of November, 1897, granting alimony and counsel fee in an action for separation brought by the plaintiff against the defendant, and also from an order entered in said clerk's office on the 15th day of November, 1897, denying his motion to resettle the first above-mentioned order.

*John L. Linehan*, for the appellant.

*Rufus O. Catlin*, for the respondent.

WOODWARD, J. :

The parties to this action were married on the 8th day of January, 1896; they have never lived together, and no children have been born to them. On the 31st day of October, 1896, the plaintiff commenced an action for separation against the defendant, but by subsequent negotiations the action was discontinued, the parties entering into an agreement in writing, under seal, by which the defendant undertook to pay to the plaintiff the sum of twenty-five dollars per week for her support and maintenance, together with a certain sum for counsel fees, it being stipulated that in the event of a default on the part of the defendant, the plaintiff was to have the

right to recommence the action which was discontinued under the agreement, and to petition any court of competent jurisdiction for alimony and counsel fees.

The defendant, through his attorneys, made various payments under this agreement, substantially complying with its requirements, until some time in the latter part of August, 1897, when, through some mismanagement or neglect on the part of his attorneys, the defendant defaulted in his payments, and the plaintiff, acting upon the right reserved to her in the articles of agreement, began the action now under consideration, and asked for alimony and counsel fees. After various adjournments, during which time the defendant paid some part of the alimony agreed upon, the court below rendered its judgment decreeing the payment of \$100 counsel fee, \$150 to the plaintiff, as accrued alimony, and the weekly payment of \$25 during the pendency of the action, and on each Saturday thereafter, until the further order of the court. Upon the entry of this order the defendant, through his counsel, asked for and was granted an order to show cause why a motion for the resettlement of the case should not be granted, the proposed resettlement differing in no material degree from that set forth in the order of the court. On the hearing of this motion it was denied, with costs, and from this the defendant appeals to this court.

It is unnecessary at this time to consider the sufficiency of the original cause of action, or whether this plaintiff had a cause of action at all. The defendant has, by a written agreement, conceded his liability to this plaintiff; he has entered into a contract to pay her the sum of twenty-five dollars per week, and in default of such payment he has stipulated that she might recommence her action and apply for counsel fees and alimony, and the order of the court does little, if any, more than to ratify this contract, and to place the matter in a position where the plaintiff shall not be annoyed in the collection of that which is conceded to be her due.

The conduct of the defendant, in so far as this litigation is concerned, has been lacking in evidence of good faith, the appeal from the order denying the motion for a resettlement being without merit, and there is no other course for this court except to affirm the judgment of the court below. A careful examination of the authorities cited in behalf of the defendant fails to disclose any adjudicated

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cases to the contrary or even to suggest a line of reasoning which would lead to any other conclusion. The plaintiff is conceded to be entitled to support at the hands of her husband; the order of the court gives her no more than the defendant has already agreed to pay, and the appeal from the order of the court upon a mere matter of detail as to the manner of payment does not seem to be entitled to any great degree of consideration.

The orders appealed from are affirmed, with costs.

All concurred.

Orders appealed from affirmed, with ten dollars costs and disbursements.

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MARY A. CHURCH, Respondent, v. LEWIS KRESNER, Appellant.

*Use of a business name — injunction to prevent another person from assuming it.*

A person whose name was not Cameron established a ready-made clothing house under the name "Cameron's," and made a reputation for the name, giving it a value as a clothing-house designation.

*Held*, that she was entitled to an injunction restraining another person, who had opened a ready-made clothing store in the immediate vicinity, from assuming such name (not his own) in his business, and thereby deceiving the public into the belief that the defendant's place of business was in fact that of the plaintiff.

APPEAL by the defendant, Lewis Kresner, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 14th day of July, 1896, upon the decision of the court rendered after a trial at the Kings County Special Term enjoining him from the use of the trade or business name of "Cameron's."

*Max Klein*, for the appellant.

*Edward M. Grout* [*Charles H. Hyde* with him on the brief], for the respondent.

WOODWARD, J.:

The plaintiff in this action established in the court below that early in the year 1892 she entered into the retail clothing business at 209 Flatbush avenue, in the city of Brooklyn, under the name and style of "Cameron's," and has continued to conduct such busi-

ness up to the present time; that at the time of entering into such business there was no other establishment in the city of Brooklyn using the name which she adopted, nor has there been any such business house known as "Cameron's" until the defendant sought to make use of this name; that the plaintiff advertised her business as "Cameron's" and became widely known as a dealer in ready-made clothing under that name, procuring a large number of customers, with whom the establishment was in good repute; that in May, 1894, the defendant opened a store for the sale of ready-made clothing in the immediate vicinity of the plaintiff's establishment, and soon after, through his agents and employees, began to create the impression that his store was "Cameron's," and that by the use of the name and the adoption of many of the devices of the plaintiff, the defendant secured to himself many of the benefits of the plaintiff's good reputation as a dealer in ready-made clothing, to her great injury; that finally, in September, 1895, the defendant openly proclaimed, by means of signs and other devices, his place as "Cameron's;" that such adoption by defendant of the name of "Cameron's" as a business name or trade sign, and his conduct of a business similar to the plaintiff's thereunder, was solely for the purpose of deceiving the public into the belief that defendant's place of business was in fact the plaintiff's place of business, and that its effect has been to mislead and divert trade established by plaintiff from her to the defendant, and that thereby the plaintiff has been greatly injured.

The learned court then finds as a conclusion that the "plaintiff possessed a property right in the name 'Cameron's' as a business trade name or mark; that the adoption of the same name by defendant was unlawful; \* \* \* that as against this defendant the plaintiff has the exclusive right to the name, having first adopted it; that plaintiff is entitled to an order enjoining and restraining the defendant from the further use of the name in any manner whatever in his business, and from further interfering with plaintiff's business by advertising his place as 'Cameron's;'" that plaintiff is further entitled to damages in the sum of fifty dollars and the costs of this action, and payment is so ordered."

The evidence fully establishes the facts as set forth in the memorandum of the court, and it is not necessary for the purposes of this

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appeal to go into the conflicting testimony and the complicated relations of some of the parties who appear in the evidence, as to the original ownership and final disposition of the title to the word "Cameron's," as applied to the business of retail clothing. The fact is established that the original company, whatever its nature may have been, made a general assignment, and that the business was closed up, so that there could have been no value in the name except as it was afterwards acquired by this plaintiff in the regular conduct of the business. The plaintiff adopted the name after it had been dropped by the company originally using it, as she had a clear right to do, and its sole value, at the present time, is derived from the character and standing of the business which she has conducted under the name of "Cameron's" from the early part of 1892.

It does not seem profitable or necessary at this time to review the long line of cases which sustain the court below in its judgment. "It is well settled," says Chief Judge ANDREWS, in *Charles S. Higgins Company v. Higgins Soap Company* (144 N. Y. 462), "that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purposes of deception, or even when innocently used without right to the detriment of another;" and this has been the unvarying attitude of the courts from the decision of the case of *Lee v. Huley* (L. R. [5 Ch. App.] 155), which was an action to restrain the use by the defendant of the name of the Guinea Coal Company in his business. In this case, which is cited with approval by Judge ANDREWS in the *Higgins Soap* case, the plaintiffs had for a series of years carried on business as coal dealers in Pall Mall, London, under the name of the Guinea Coal Company, and they were frequently called the Pall Mall Guinea Coal Company. The defendant, who had been their manager, finally set up business in the same street under the style of the Pall Mall Guinea Coal Company, and while it appeared that there were other Guinea coal companies in London, so that the plaintiffs did not have the exclusive right to the use of the trade mark Guinea Coal Company, yet the court held that they were entitled, as against the defendant, to be protected in the use of the name. Lord Justice GIFFORD, writing the opinion of the court, says: "I quite agree that

they (plaintiffs) have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

This same case is cited with approval in the case of *Newman v. Alvord* (51 N. Y. 189), Commissioner EARL delivering the opinion of the court, and it may be fairly said to state the law as it exists in the State of New York in respect to the case at bar.

In the case of *Devlin v. Devlin* (69 N. Y. 212) the court went so far as to hold that the defendant could not use his own name, except with his initials plainly connected with the name, as a sign, because such use tended to "mislead or induce the public to believe or suppose he is the plaintiffs." In *Caswell v. Hazard* (121 N. Y. 484), Judge RUGER, delivering the opinion of the court, says: "The right which every person has to use his own name in the prosecution of his business cannot be disputed, and this right can be limited or controlled only when such name has become the trade mark or business sign of another, and is being used to deceive the public or defraud the person who made it valuable."

"Whether the court will interfere in a particular case must depend upon circumstances; the identity or similarity of the names; the identity of the business of the respective corporations; how far the name is a true description of the kind and quality of the articles manufactured or the business carried on; the extent of the confusion which may be created or apprehended, and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy," says Judge ANDREWS in the case of *Charles S. Higgins Company v. Higgins Soap Company* (*supra*), and these matters all seem to have been taken into consideration by the trial court in arriving at its judgment.

The plaintiff had established a business under the name of "Cameron's;" that business was the sale of ready-made clothing. After she had made a reputation for the name, giving it a value as a clothing-house designation, this defendant secured a location in the

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immediate vicinity and adopted the same name, with the undoubted intention of taking to himself the benefits incident to a good name and business, and the plaintiff has the same right to protection that she would have if any other valuable property were to be taken from her by the defendant for his own use and enjoyment. If the defendant had been desirous of building up a reputation for himself; if he had not found the name of "Cameron's" to have a value to which he had contributed no part, and to which he had no right of enjoyment, can we conceive of a reason why he should, after a business experience of some months, take to himself a name which had already been adopted by another in the same line of business and in his own immediate locality? There can be but one answer to this question.

The judgment of the trial court is affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

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CLARENCE S. McCLELLAN and THOMAS R. HODGE, Appellants, v.  
NAOMI DUNCOMBE, Respondent.

*Bill of particulars, applied for on the ground that it is necessary to enable the defendant to answer — it cannot be granted upon the ground that it is necessary to enable the defendant to prepare for trial.*

Where, pending the decision of a motion, made by the defendant in an action, for a bill of particulars of the matters alleged in the complaint, upon the ground that it is necessary to enable the defendant to answer, the answer is served (an application for an extension of time to answer having been refused), the court has no power to order the plaintiff to serve a bill of particulars upon the ground that it is necessary to enable the defendant to prepare for trial.

APPEAL by the plaintiffs, Clarence S. McClellan and another, from an order of the Supreme Court, made at the Dutchess County Special Term and entered in the office of the clerk of the county of Westchester on the 29th day of July, 1897, granting the defendant's motion for a bill of particulars.

*William L. Snyder*, for the appellants.

*Roger M. Sherman*, for the respondent.

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WOODWARD, J. :

The plaintiffs bring this action against this defendant for the purpose of collecting a bill for services alleged to have been rendered the defendant in connection with the probate of the will, and the settlement of the estate, of the husband of the defendant. The defendant, before answering, made application for an order compelling the plaintiffs to furnish a bill of particulars, alleging in her affidavit that the information which she demanded was necessary in making her answer to the complaint. This application for an order to furnish a bill of particulars was accompanied by a request for an extension of time in which to answer. This the court refused to grant, and the answer was served within the time required by the practice of this court. Subsequently, the Special Term granted the order for a bill of particulars, accompanying it with the following opinion :

"It has been decided that a bill of particulars was not needed as a preliminary to putting in answer. A motion which in effect seeks to review this result is not proper.

'A bill of particulars is proper, however, on proceeding in this action, to enable the defendant to prepare for trial, and the application for such bill of particulars is granted.

"If from the bill a good ground is made apparent for an amendment to the answer, application can be made on motion for leave to amend. No costs."

The defendant asked for a bill of particulars, asserting in her affidavit that it was necessary to enable her to answer. She made no pretense that a bill of particulars was necessary on the trial of the action, and there was nothing before the court to justify the granting of an order the necessity for which had not been asserted. The case of *The American Credit Indemnity Company v. Bondy* (17 App. Div. 328) is practically conclusive on this point. Justice WILLIAMS, delivering the opinion of the court, says: "The action was brought to recover damages for an alleged libel. The bill of particulars granted was with reference to certain allegations of special damage. No answer had been served when the order appealed from was made. The defendant stated in his affidavit used on the motion that a bill of particulars was necessary and material to his defense in the case, and to enable him to answer, *as he was advised by his counsel*.

"The order was prematurely granted if based upon the ground that it was necessary for the purpose of the defense of the case. It could not be said any defense would be made until an issue was raised by the service of an answer. The order cannot be supported upon this ground." (*Watertown Paper Co. v. West*, 3 App. Div. 451.)

"The only ground upon which the order could be made was, that it was necessary to enable the defendant to answer. The defendant stated that he was advised by counsel that it *was* so necessary, but we are of the opinion that such advice was not well considered. The defendant stated that he was ignorant of the particulars of the losses alleged, and had no means of knowing of any losses suffered by the plaintiff. This being assumed as true, we see no reason why he could not, without a bill of particulars, have denied any knowledge or information sufficient to form a belief as to the allegations in question. (Code Civ. Proc. § 500.) That section did not require him to *deny on information and belief*. He might properly deny in the language of the section, and was not obliged to go further."

In the case at bar the only ground on which the order could be made was, that it was necessary to enable the defendant to answer, because that was the only ground on which it was asked, and it having been decided that the bill of particulars was not necessary to enable her to answer, there was nothing before the court for it to act upon.

"It seems to be obvious," say the court in the case of *Morrill v. Kazis* (8 App. Div. 304), "that the only purpose of making an application of this kind was to enable the defendant to get from the plaintiff the evidence intended to be used on the trial. That such is not the office of a bill of particulars it is unnecessary to argue. In *Hayes v. St. Mary's Lodging House* (89 Hun, 27); *Bender v. Bender* (88 id. 449), and in *Newell v. Butler* (38 id. 104), that practice was condemned. It was not necessary in any way to enable the defendant to answer the complaint that he should have the information sought to be obtained. It was entirely competent for the defendant to answer, denying upon information and belief either of the matters upon which the plaintiff's cause of action was based. The purpose of an answer is to raise an issue; and, to say that the defendant, in order to raise an issue, must be informed by the plain-

tiff of all the evidence that he has to support each and every particular item of what apparently would constitute a long account, is an absurdity. The Code of Civil Procedure expressly provides the form in which an answer may be made where the party does not possess the information to enable him positively to contradict an averment of the complaint."

This is precisely the condition which surrounds the defendant in the case at bar. The plaintiffs allege that she owes them for services ranging over a period of three years. She demands a bill of particulars setting out in detail the days and dates on which the service was rendered. Obviously this information is not necessary to an answer, and, as it was only to enable the defendant to answer that a bill of particulars was demanded, there can be no justification for the granting of such an order upon the papers before the court, now that the answer has been put in and the issues have been made. That a bill of particulars may become necessary during the litigation, and that such an order may be entirely proper upon a motion setting forth the facts, it is no part of the duty of this court to deny, but, upon the case now before us, there can be little doubt that the court below was in error in granting the order for a bill of particulars.

The order is reversed, with costs.

All concurred.

Order reversed, with ten dollars costs and disbursements.

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FRANKLIN J. TRUMBULL, Respondent, v. JOHN J. ASHLEY, Appellant.

*An answer denying material allegations upon information and belief cannot be overruled as frivolous.*

In an action brought by a judgment creditor of a corporation to recover of a stockholder thereof a certain sum because of his unpaid subscription, an answer denying upon information and belief allegations of the complaint as to the time when the corporation was organized, the amount of its stock, the amount actually subscribed for and the amount actually paid in, and as to the defendant's failure to pay his subscription to the stock, puts in issue material allegations of the complaint, and cannot be overruled as frivolous, however improbable it may appear to the court that the defendant is not aware of the exact facts.

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APPEAL by the defendant, John J. Ashley, from a judgment of the Supreme Court in favor of the plaintiff for \$214.36, entered in the office of the clerk of the county of Kings on the 16th day of August, 1897, upon an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 10th day of August, 1897, striking out the answer as frivolous and directing the entry of judgment on the pleadings in favor of the plaintiff, with notice of an intention to bring up for review upon such appeal the said order.

*Clifton V. Edwards*, for the appellant.

*Max J. Bernheim* [*Louis W. Dinkelspiel* with him on the brief], for the respondent.

WOODWARD, J. :

This action was brought to recover the sum of \$170.92 on account of the defendant's unpaid subscription to the capital stock of the American Engineering Works, of which the plaintiff herein is a judgment creditor. It is alleged in the complaint that the plaintiff has performed certain services for the American Engineering Works, for which he has recovered a judgment, upon which an execution was issued, which has been returned unsatisfied, and he now seeks to recover of the defendant as a stockholder in the said corporation. It is also alleged, on information and belief, that defendant, John J. Ashley, "subscribed for and owns five shares of the capital stock of said American Engineering Works, par value of which is five hundred dollars, but that said amount, five hundred dollars, has never been paid in by him," and "on information and belief that said corporation was organized in the year 1896 with a capital stock of five thousand dollars, divided into fifty shares of the par value of one hundred dollars each; that the amount of capital stock actually subscribed was fifteen hundred dollars, and of this amount five hundred dollars was actually paid in by the stockholders."

The answer admits, or refuses to deny, all of the allegations except those set out in paragraphs 3 and 4 of the complaint, and which are quoted above, and these are denied on information and belief. The plaintiff made a motion at a Special Term for judgment against the defendant on the ground that the answer of the

defendant was frivolous, and for an order striking out as a sham and false in fact that part of defendant's answer embraced in paragraph No. 2 of said answer. The learned court, upon a hearing of the motion, ordered and adjudged "that the answer of the defendant herein be overruled as frivolous, and that the plaintiff have judgment thereon for the relief demanded in the complaint, with the costs and disbursements of this action and ten dollars costs of this motion." The defendant appeals from this order.

The court below having refused to pass upon the motion to strike out paragraph 2 of the answer, and having rendered its judgment solely upon the proposition that the answer, considered as a whole, was frivolous, there is but one question presented to this court for decision, and that is whether the court below erred in overruling the answer of the defendant upon the grounds stated. Upon this point there can hardly be two opinions. "It is now settled," says Justice HATCH in the case of *Humble v. McDonough* (5 Misc. Rep. 508), "that a denial upon information and belief is authorized by section 500, Code of Civil Procedure," and if the answer of the defendant denied a material fact necessary to a cause of action, he was clearly within the rule as stated by Justice HATCH, and the court, in overruling such an answer, was in error. The plaintiff alleges, and the allegation is necessary to maintain the action, that the "said corporation was organized in the year 1896 with a capital stock of five thousand dollars, divided into fifty shares of the par value of one hundred dollars each; that the amount of capital stock actually subscribed was fifteen hundred dollars, and of this amount five hundred dollars was actually paid in by the stockholders." This the defendant denies upon information and belief.

Again, it is alleged, and the allegation is necessary to the maintenance of the action, that defendant "John J. Ashley subscribed for and owns five shares of the capital stock of said American Engineering Works, par value of which is five hundred dollars, but that said amount, five hundred dollars, has never been paid in by him." This the defendant denies upon information and belief, and however improbable it may have appeared to the court below that the defendant should not have been aware of the exact facts, the issue having been raised, the burden of proving the allegations was thrown upon the plaintiff, and it was not within the province of the

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court to overrule the answer upon the ground that it was frivolous. "An answer can be said to be frivolous only when it is so clearly bad as to require no argument," says Justice RUMSEY in the case of *Gruenstein v. Jablonsky* (1 App. Div. 580) "to show its character, and which would be said to be so manifestly defective as to be indicative of bad faith upon a mere inspection. (*Strong v. Sproul*, 53 N. Y. 497.) Unless it appears by inspection of the pleading that it raises no issue upon any fact which the plaintiff must prove, it is not frivolous, however objectionable it may be in other respects." "An answer must be tested," says Justice LANDON in the case of *West End Savings & Loan Association v. Niver* (4 App. Div. 618), "by the complaint, and if it puts in issue its material allegations as to the defendant, it is good enough for the purposes of the action." "We think, therefore, upon reason as well as upon the construction of the Code," says Judge ANDREWS in delivering the opinion of the court in the case of *Bennett v. Leeds Manufacturing Co.* (110 N. Y. 150), "a denial in a verified answer of a material allegation in the complaint, 'upon information and belief,' is good. Any other conclusion would lead in some cases to great injustice. There are diverse authorities upon the question, but the great preponderance of authority supports the conclusion we have reached."

The denial of a material fact is not frivolous; its character is not changed by the fact that the denial is made upon "information and belief," and the court below was clearly in error in overruling the answer of the defendant.

The judgment of the court is, therefore, reversed.

All concurred.

Judgment reversed, with costs to the appellant to abide the event, and motion denied, with ten dollars costs.

NATHANIEL K. WEED and WILLIAM D. BAGSHAW, Respondents, v.  
MICHAEL DONAHUE, Appellant.

*Deed — construction of a grant of an easement in an alley.*

A grant made by the common owner of two adjoining lots, each about one hundred feet deep, and each having a house thereon about twenty-two feet in depth, of the use of an alley, lying between such lots, expressed in the words "Together with the right, at all times, to the use of an alleyway ten feet wide, along the south side of said premises above described, in common with the owner or owners of the premises adjoining on the south, at all times, for ingress and egress to and from said lands above described," conveys to the grantee an easement in an alley ten feet wide running along the entire length of the south side of his lot, and such easement is not limited to a distance of only such length in excess of twenty-two feet as would enable the grantee of the first conveyed parcel to turn from the alley into his lot behind the house which stood on such lot at the time of the conveyance.

APPEAL by the defendant, Michael Donahue, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Orange on the 1st day of June, 1897, upon the decision of the court rendered after a trial at the Orange Special Term.

*R. C. Coleman*, for the appellant.

*A. H. F. Seeger*, for the respondents.

Judgment affirmed, with costs, on opinion of the Special Term.

All concurred.

The following is the opinion of the Special Term :

HIRSCHBERG, J. :

At a time when Mary McGraw was the owner of both the parcels of land now owned by the parties to this action respectively, on the east side of Chambers street in the city of Newburgh, she conveyed the premises now owned by the plaintiffs, by a conveyance containing the following provision : "Together with the right, at all times, to the use of an alleyway ten feet wide, along the south side of said premises above described, in common with the owner or owners of the premises adjoining on the south, at all times, for ingress and egress to and from said lands above described. Any expense of keeping up said alleyway and the gate at the entrance thereof to be

borne equally by all the parties using the same. And together with the right to use the drains running through the property adjoining on the south under said alleyway as they now are, with right to enter and repair the same at any time. Said rights to go with the land to the party of the second, his heirs and assigns." The lands on the south above referred to, and then owned by Mary McGraw, have since been conveyed to the defendant, but it does not appear in what terms the plaintiffs' rights in such land are recognized and reserved.

At the time of the conveyance of the plaintiffs' lands, there were old frame buildings on the Chambers street front of both properties of a depth of twenty-two feet each, and there were barns or stables at the extreme rear. The depth of the lots was from one hundred to one hundred and two feet, the front of the plaintiffs' premises was twenty-five feet and the front of the premises remaining to Mrs. McGraw, but now owned by the defendant, was fifty feet and one inch. The distance between the two houses was ten feet and eight inches, and a gate was maintained across this space four or five feet east of Chambers street against intrusion by strangers. A short distance from the rear of the plaintiffs' building there was a gate in the division fence, and woodsheds were along or near the dividing line a few feet further to the eastward. On the defendant's lot, near the rear, but adjoining the dividing line, an open shed was erected subsequently to the plaintiffs' conveyance, but so constructed that horses and vehicles could be driven through. Some evidence tends to show that the owners and tenants of plaintiffs' property have driven upon that property from the defendant's, by way of the alley referred to, at other points than where the gate stood in the division fence. The old frame building referred to covered the entire front of the plaintiffs' lot.

The plaintiffs have recently torn down the old frame building on their lot, and have erected a new one of brick, twenty-five feet front by sixty-two feet deep. The defendant has placed a closed gate or other obstruction across his property to the west of the easterly end of this new building, thus preventing the plaintiffs from reaching their lot at the rear of such building and from access through the alleyway to a new stable they are about to construct there. This action is brought to compel the removal of the obstruction.

The defendant contends that the alleyway referred to in the deed



was only the space between the two buildings, and that the right to its use was limited to sufficient room for turning into plaintiffs' property after traversing the twenty-two feet between the buildings. I think such a construction would be narrower than the language used allows, and narrower than was contemplated by Mrs. McGraw and her grantee at the time the right in question was created.

As the space between the two houses was about ten feet in width, it would have been easy to have conferred a right to use the alleyway "formed by the two houses," or "the space between the two houses," as a means of access to the lands conveyed, by words clearly limiting the exercise of the right to such space plainly and expressly. The reference would have been to an existing alleyway, visible and requiring no description or measurement. But the parties seemed to contemplate future sales of the land then retained by Mrs. McGraw, in parcels to different owners, and the creation for the use of each of them of an alleyway to be maintained in common. The right conveyed is expressly for "all time;" it is the right to use "an alleyway ten feet wide," not the alleyway then existing; this alleyway is, or is to be, "along the south side" of the premises conveyed, not along the eastwardly twenty-two feet of the south side; it is to furnish access to and egress from the "lands" conveyed without restriction or limitation; the use is to be in common with the "owner or owners" of the premises adjoining on the south; and the expense of keeping up said alleyway and the entrance gate is to be borne equally by all the parties using the same. These provisions seem to be more consonant with a scheme to preserve a ten-foot alleyway for the beneficial use of all future owners of the entire property, than with a mere grant to the plaintiffs while the dilapidated buildings stand, of the use of the open space between them, with a sharp turn at the end of the twenty-two feet. The latter construction would prohibit the plaintiffs from extending the old building, or constructing a new one deeper, without relinquishing the right of way forever. Such a construction seems to me unreasonable, and not within the language employed, and in violation of the rule of construction by which the intention controls where the language is doubtful.

Judgment should pass for the plaintiffs removing the obstructions, with costs.

GERARD BENNETT and HERMAN D. LEVINO, Respondents, v. EDISON ELECTRIC ILLUMINATING COMPANY of Brooklyn, Appellant.

*Contract to dig wells, the payment for the work to be dependent on the amount of water furnished — the proper construction of a provision for a test determined by the action of the parties — rule of construction of evidence where a party is in possession of the subject-matter of a negative averment.*

A contract, drawn by a layman, was as follows: "We agree to put in for you two wells to furnish station No. 3 at No. 81 Guinett Street, Brooklyn, E. D., at the uniform price of \$10.00 per 1,000 gallons of water furnished per day of 24 hours. \* \* \* It is understood that after test and upon completion of the wells the price agreed upon is due and payable." Under this contract a test of less than twenty-four hours continuance took place, of which the corporation for which the work was to be done was notified, and at which its representative was present, and neither at that time nor for a long time thereafter did the corporation express any dissatisfaction with the manner in which the test was made.

*Held*, that, under the circumstances, it was not necessary that the test should have continued for twenty four hours.

Where a corporation in possession of wells presents, upon the trial of an issue as to their capacity, very meagre evidence as to their production, the principle may be invoked against it that where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is to be taken as true unless disproved by that party.

APPEAL by the defendant, the Edison Electric Illuminating Company of Brooklyn, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 15th day of June, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 22d day of July, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Edward M. Shepard* [*Frank Harvey Field* with him on the brief], for the appellant.

*Edward M. Grout*, for the respondents.

GOODRICH, P. J.:

The plaintiffs, engineers and contractors doing business under the name of the Metropolitan Construction Company, in April, 1894, entered into a written contract with the defendant corporation for

the building of two wells. The material part of this contract reads as follows: "We agree to put in for you two wells to furnish station No. 3 at No. 81 Guinett\* Street, Brooklyn, E. D., at the uniform price of \$10.00 per 1,000 gallons of water furnished per day of 24 hours. You are to give us free access to your premises for our men and tools. It is understood that after test and upon completion of the wells, the price agreed upon is due and payable."

The pleadings were amended at the trial and, as amended, the complaint alleged that the plaintiffs, by an instrument in writing, contracted with the defendant "to put in two wells to furnish its station No. 3, at 81 Gwinnett\* street, in the city of Brooklyn, at the uniform price of \$10 per thousand gallons of water per day of twenty-four hours," and that they "put in two wells at said station which furnished water at the rate of 800 gallons per minute, and 4,800 gallons per hour, and 1,150,000 per day of 24 hours, and that there is now justly due them the sum of eleven thousand five hundred and twenty dollars therefor," and demanded judgment for that sum and interest.

The amended answer denied these allegations, and set up as an equitable defense that the plaintiffs agreed to construct two wells "at the rate of one dollar per thousand gallons of water per day of twenty-four hours, furnished from said wells, in addition to the water then being derived from the other wells of the defendant;" that the written contract, in stating the price, stated it to be ten dollars instead of one dollar, that this was not the intent of the parties, and that the ten dollars was inserted by the plaintiffs with intent to deceive or defraud the defendant, and asked for a reformation of the contract. The reply denied the allegations of the counterclaim.

The defendant at the Trial Term moved that the equitable issues be tried first, and that thereafter the court proceed with the trial of the common-law issues. The motion was denied. The defendant thereupon moved that the equitable issues be sent to the Special Term, which was also denied. To each denial the defendant excepted.

This court, on a previous appeal from an order denying a motion of the defendant for a trial of the equitable issues at Special

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\* *Sic.*

Term, affirmed the order without prejudice to the right of the defendant to renew the same at the trial. The opinion recognized the defendant's claim that the answer constituted a counterclaim, but held that "the matter was equally available to the defendant as a defense to the action in the manner in which it was plead, and if it was established that there was a mistake in the respect claimed, it constituted a good defense to that extent, and the plaintiff's action would be defeated or their damages be measured by the reduced price." (18 App. Div. 411.) This decision renders it unnecessary to consider this question further.

The trial of the issues raised by the amended proceedings resulted in a verdict for \$5,750, but a question arising as to the interest, the jury was sent back for further consideration, and returned with a verdict adding the interest. No objection was made by the defendant until after the return of the jury and the rendition of the amended verdict, which was for \$6,468.66. After the verdict the defendant excepted. The exception to the rendition of the corrected verdict is untenable, as no objection was made before the jury was sent out for further consideration. From the judgment entered upon this verdict and from an order denying a new trial, the defendant appeals.

The contention of the parties centers upon three questions: *First*. Whether the price agreed upon was ten dollars or one dollar per thousand gallons. *Second*. Does the contract, by its terms, require a continuous test through twenty-four hours? *Third*. What amount of water the wells furnished.

As to the first question, there was a large amount of evidence on both sides. The witnesses testified to the negotiation which preceded the sending of a written proposal, the meeting of the plaintiffs with Mr. Barstow, the defendant's general superintendent, the discussion of the terms of the proposal, the obliteration of certain words and sentences therein, the reinsertion of some phrases by Mr. Barstow after the subject had been discussed and the final signature of the defendant by "S. W. Barstow, Gen'l Sup't," after, as he testified, he had read it through.

There were two copies of this contract, an original and a carbon copy, of which the defendant had one. That copy was not produced on the trial, but testimony was given by the defendant to

account for its loss. On inspection of the copy produced by the plaintiffs, Mr. Barstow was examined as to the appearance of the figures, ten dollars, and testified that he could not discover anything that looked like an alteration.

The defendant, on the question of the price which was agreed upon, and before any evidence was given by the plaintiffs on the subject of the value or customary price paid for digging wells, furnished testimony as to the usual price for digging wells like those in question. The plaintiffs, on rebuttal, offered evidence as to the customary price, and also as to the fair price in a case where the contractor's emolument was contingent upon successful results. The defendant objected and excepted on the ground that the plaintiffs should have given their testimony upon this subject in the first instance; but this was a matter resting in the discretion of the trial justice.

The court carefully charged the jury upon the question of the price agreed upon, stating the contention of the parties, and fairly and clearly submitted to the jury the question whether it was the actual agreement between the parties that the price was to be one dollar or ten dollars per thousand gallons, and the verdict is not to be disturbed as there does not seem to be any such preponderance of evidence as to justify setting it aside.

As to the second question the contract reads: "At the uniform price of \$10.00 per 1,000 gallons of water furnished per day of 24 hours." The plaintiffs contend that the fair construction of this language is that a test need not actually continue during and throughout a period of twenty-four hours, but need only be sufficient to show that there would be a continuing delivery of the required amount during that period; while the defendant contends that it requires the test to be actually continued through a period of twenty-four hours and a flow to be actually shown, which produces the results claimed.

I cannot discover any significance in the use of the word "uniform" in the contract, it being used, apparently, as a qualifying adjective to the word "price." If it had qualified the word "furnished" there would be ground for the defendant's contention. The other words are "furnished per day of 24 hours." I think the use of the words "of 24 hours" was intended to define the length of the day

so as to distinguish it from the ordinary use of the word "day," as applied to the operations of manufacturers. The defendant offered evidence to show that the operation of the company's works was continuous during the entire day and night, and that it required a flow of water at all hours, and this would seem to have afforded a reason why the company should have used words defining the character and method of the test if it had intended to require a special method of testing. The words seem to have been inserted rather for the plaintiffs' benefit in determining the amount of their compensation, as it was not to be limited to the amount of water furnished during the hours of an ordinary day's work, but to the amount furnished during twenty-four hours. For if the wells produced 800 gallons per minute or 48,000 gallons per hour, there would be a very serious difference in the price to be paid if it were to be calculated on the flow for eight or ten hours, instead of on the flow for twenty-four hours.

This contract was not drawn by lawyers. It was a contract between laymen. It falls within the category of mercantile contracts, and such contracts are not to be construed with strictness, but in such a manner as to enable the court to arrive at the real meaning and intention of the parties without hampering it with technical rules of interpretation. (*Raymond v. Tyson*, 17 How. 53.)

In *Blossom v. Griffin* (13 N. Y. 569) it was held that, in construing a writing, "it is proper to look at all the surrounding circumstances, the pre-existing relation between the parties, and then to see what they mean when they speak." And in *Gray v. Green* (9 Hun, 334; *affd.* without opinion in 102 N. Y. 674) it was held that parties may give to a contract a practical construction by their acts.

Here the question of test was discussed between the parties before the contract was signed, and the conditions and method of the test were not specified. The words "after test" were struck out and again inserted by the defendant's superintendent. After the defendant was notified to attend the test, its representatives did attend, and there is no evidence that any expression of dissatisfaction was made at that time with the mode of the test as it was made. If nothing further was done or said within a reasonable time thereafter, it can hardly be claimed that the parties differed in the deduction proper to be made as to the amount of water which the plain-

tiffs' wells would furnish during twenty-four hours, or that they had not given a practical construction to the method of test to which the contract so briefly related. Indeed, it may be said that if the defendant had not considered the test a practical and sufficient one, it could have manifested its disapproval of it at the time when it was made, or within a reasonable time thereafter, but the evidence shows that no such suggestion was made until long subsequently. We think this affords a practical construction of the meaning of the word "test" which the parties had in mind when the contract was signed. If the defendant had had any doubt upon the subject, it could have called for a more stringent test, or if it then had construed the contract as requiring a continuous flow to be shown for a period of twenty-four hours, it could have expressed that idea, and if such a test had been refused, a new and different question might have arisen at the trial. But its silence in this regard gave consent to the test as sufficient in the way in which it was made.

The third question, as to the amount of water produced, requires a somewhat more extended consideration. It involves numerous elements. The contract required the plaintiffs to furnish a certain quantity of water, and the court charged that this meant that the plaintiffs should furnish an additional supply of water, additional to what was already produced by the then existing wells of the defendant, and as this was most favorable to the appellant, no question as to that ruling is raised on this appeal.

The contract provided for the payment of the price "after test, and upon completion of the wells." The court charged that the question to be determined was, "what did the plaintiffs supply, for which they are entitled to be paid here?" and "that the burden is upon the plaintiffs to satisfy you by a fair preponderance of evidence that each minute during twenty-four hours the plaintiffs' pumps together yielded 800 gallons a minute 'new' water, before you can give them one dollar or ten dollars for each of these thousand gallons per minute per day."

There was no contention on the part of the plaintiffs that there was any continuous test of well No. 1 during a period of twenty-four hours. There was evidence of various tests for different parts of different days, and of the method, measures and results of such tests, and of the amount of water delivered. But there was evidence

of a continuous test of well No. 2 running through a period of twenty-four hours. It is true that the defendant had no representative present, but the fact remains that there was evidence that in September a pump was put on the well; that it was run continuously for twenty-four hours, with the exception of the hour occupied in changing the day to the night shift of workmen, and that this continued not only for one day of twenty-four hours but for several days.

Barstow testified that at the time of the signing of the contract there was some conversation about the subject of test, but there does not seem to have been any actual agreement as to the method of the test named in the contract, and there is a clause in it that "all the conditions of this contract are contained above." Under these circumstances, the learned court correctly stated the principle upon which a test should be adjudged, when it said that "test," as used in the contract, meant "a fair, adequate, intelligent and ordinary test," and that the jury "must be satisfied that the goods were delivered; that the quantity of water for which you render a verdict was furnished, or could have been furnished."

The plaintiffs gave evidence of several witnesses as to the method of the tests on several occasions, one of which was made in March, 1895, upon well No. 1, at which, after notification, two of the defendants' representatives, Gilladeau and Wolff, were present; that a centrifugal pump was attached to one of the walls; that a fifty-three-gallon barrel was placed under the stream of water and filled at intervals twenty or twenty-five times, and that the number of seconds which it took to fill the barrel was from six and one-half to ten, equivalent to about 175 or 300 gallons per minute; that this method was also pursued at intervals in the forenoon and afternoon and for several hours; that the time was taken by Gilladeau and Wolff; that this was an ordinary method of testing used by persons in the business; that the well had been yielding for two months prior to the time of the test; that the pumping was stopped at intervals to see whether the amount of water in the well was reduced and that it was not, but that, on the contrary, the supply of water increased by pumping; that a test float was put in one well while pumping the other to see if the pumping of one well



reduced the water in the other, and that it did not except at the starting; that on similar tests of well No. 2, made about a month later and on several occasions, that well yielded 500 gallons per minute, and that this test occurred after they had been pumping water from it for some weeks previously. There was also evidence that, while at first the pumps brought up sand, this condition ceased and the water came up pure. The defendant produced evidence contradicting some of these statements, but it produced no evidence to show that objection was made by its representatives as to the method of the test of the first well as already described. It must, therefore, be considered, as there was evidence given by both parties as to the tests and their sufficiency and results, that the jury was justified in finding that there was a sufficient test, and that there was water furnished to at least one-half of the quantity claimed by the plaintiffs, in accordance with which it rendered a verdict for about one-half the amount for which the plaintiffs demanded judgment.

The defendant, at the close of the plaintiffs' evidence, moved to dismiss the complaint on the ground that the contract contained the following clause: "We promise to give you first-class workmanship and material throughout," and that there was no evidence that this provision was complied with; that no sufficient test was proved, and that it was no proof of the quantity of water furnished during a day of twenty-four hours. The motion was renewed upon the same and upon additional grounds, at the close of all the evidence, and the question must be decided on all the evidence introduced, irrespective of the time when it was given. There was evidence as to the description of the work and of the construction and its methods, and that the wells were constructed in the usual manner, sufficient to justify the submission of the case to the jury. The main contention on this subject seems to have been that the point of the well tube was improperly constructed, but, in respect to this, there was evidence sufficient to justify the jury in finding that the construction used was usual and proper.

The second and third grounds have already been considered and we do not find any error in the refusal to dismiss at the close of the plaintiffs' evidence or at the close of the entire case. It is also to be observed that even on the defendant's theory there was uncon-

tradicted evidence of a certain amount of water for a period less than twenty-four hours continuously, and the plaintiffs were entitled to have submitted to the jury the question as to the actual amount furnished during this time, although it might have been much less than the amount of their original claim; and this is practically conceded in the brief of the learned counsel for the defendant.

The defendant's exception to the exclusion of evidence as to the diminution of water in the defendant's other wells, upon a test made by it in March, 1897, was proper, as the evidence related to a time when the defendant had materially changed the condition by sinking additional wells after the execution of the contract with the plaintiffs. The defendant contends that the burden of proof rested on the plaintiff throughout the whole trial, in accord with the cases of *The Farmers' Loan & Trust Co. v. Siefke* (144 N. Y. 354) and *Whitlatch v. Fidelity & Casualty Co.* (149 id. 45), and that, therefore, they were bound to establish the fact that the water which they furnished through their wells was new water and not water derived at the expense of the defendant's other wells. The court so charged. The question, therefore, occurs, whether there was evidence sufficient to show that the water was not withdrawn from the defendant's three wells which were in existence at the time of the making of the contract. I exclude from this consideration the evidence as to tests made by the defendant in March, 1897, after its two new wells had been driven, because the condition had been materially changed by the sinking of these new wells. The defendant offered evidence to show that on some occasions while the plaintiffs were pumping their wells the vacuum gauge attached to the defendant's engines showed that the engineer was getting no water and that he was compelled to use water from the city's works with which defendant had connection; that he requested the plaintiffs to stop pumping, and that when they did stop, the city water was turned off. The force of this evidence is impaired, however, by the statement made on cross-examination, that the vacuum gauge, even though the flow of water be constant, will vary from other causes which operate to occasion it.

Assuming that the plaintiffs were required to prove, as the court charged, that the water was not drawn from the other wells, there was evidence tending to show that the pumping on one of the plain-

tiffs' wells did not decrease the water in the other, which was thirty-five feet distant, while all the other of the old wells of the defendant were still further distant. The jury, under this evidence, might properly infer that the plaintiffs had established the fact required by the charge of the court. In view of the slight and shaken evidence of the defendant on this subject, our conclusion finds support in the elementary rule "that where the subject-matter of a negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party." (1 Greenl. Ev. [15th ed.] § 79.) For the defendant, being in possession of the premises, had abundant opportunity for observation and test of the exact condition and result upon its wells of pumping the plaintiffs' wells, and yet furnished only the meagre result already alluded to.

The exception also to the refusal to charge as to simultaneous tests of the plaintiffs' two wells was proper, as there was contradictory evidence on the subject, and the court submitted the question to the jury as matter of fact.

The judgment and order should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

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JOSEPH H. TOOKER, JR., Respondent, v. THE SECURITY TRUST COMPANY, Appellant.

*Life insurance — waiver of a cash payment of the premium — estoppel — omission from a health certificate of a consultation with a physician for a trivial sore on the head — effect of paying another policy upon the same life under the same state of facts.*

Where a life insurance company has, on several occasions, allowed a person to solicit policies for it, and has permitted him to deliver them without exacting payment in cash on the delivery of the premium receipt, as required by the terms of the policy, it constitutes him its agent with authority to waive the condition requiring payment in cash; and where such agent accepts in return for a policy notes of the son of the insured, and, within a week thereafter, accepts for the notes the check of the wife of the insured, and thereupon delivers the premium receipt, the insurer is estopped from subsequently denying the due receipt of the premium.

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A failure to embody in a health certificate, accompanying the application for the insurance, a statement made to the agent by the insured that he had been treated by a physician for an unimportant sore on his head, does not constitute a breach of a warranty contained in the application in the technically untrue answer to a question therein as to who was the last physician consulted by the insured. The simple omission of a trivial fact of this kind will not vitiate a policy, particularly where the policy indicates that an omission, which will constitute a breach, must be intentional and fraudulent, and where the policy does not by its terms constitute the soliciting agent the agent of the insured.

*Seem*, that where the insurer, with full knowledge of the facts, pays one of two policies, issued upon the same life and substantially upon the same application, there is a waiver of any invalidity or insufficiency of the proofs of death under the other policy.

APPEAL by the defendant, The Security Trust Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 15th day of May, 1897, upon the decision of the court rendered after a trial at the Westchester Special Term.

*Oliver P. Buel*, for the appellant.

*Wilson Brown, Jr.*, for the respondent.

GOODRICH, P. J. :

The plaintiff is the assignee of a policy of \$5,000 insurance written by the defendant, a Pennsylvania corporation, on the life of the plaintiff's father. In January, 1896, the father made application, in writing, to the defendant through Seymour L. Rau for insurance on his life to the amount of \$5,000. Two policies of \$5,000 each and numbered 597 and 598 were delivered by the defendant to Fleming & Kell, its general agents and managers in the city of New York, who had full power and were authorized by the defendant to effect insurance by such insurance policies upon the life of the insured. Fleming & Kell placed the policies in the possession of one Leach, who handed them to Rau, with whom he was associated in the business. Rau delivered policy 598 to the insured, the first premium being paid simultaneously therewith.

There is evidence tending to show that, although Tooker, the insured, had applied for one policy of \$5,000, the defendant, or its agent, was desirous of issuing the second policy, numbered 597, but that such policy, after being held by the agent for some time, was returned to the company, which in place of it issued the policy in

suit, numbered 1,541, and this was also sent to Leach. The original application upon which the first two policies were issued was on March third amended in some particulars to which reference will hereafter be made. The policy in suit was dated May second, and was sent by the defendant to Fleming & Kell, who on May fourth sent it to Leach in a letter reading: "May 4th, 1896. We enclose herewith policies 1541, J. H. Tooker, \$5,000. 1542, F. A. Schultz, \$5,000. Please have health certificates signed before delivering policies." Leach handed the envelope containing the policy to Rau, who testified that there was no receipt for premium or health certificate in the envelope. On several occasions thereafter Rau endeavored to persuade Tooker to take the policy and pay the premiums, but it was not until the first day of July that the policy was delivered to Tooker or his son, the plaintiff, after Rau had threatened to return the policy to the corporation unless the affair was settled on that day, when, for the premium of \$589.50, at the suggestion of Rau two notes of the son were given and the policy delivered to the insured. It appeared that the father was not prepared to pay the premium in cash, and was prevented by the articles of his partnership from giving notes. At this time the insured was apparently in good health. When the notes were given Tooker told Rau that he would pay cash for them within a couple of days. On the third Rau telephoned Tooker for the cash. Tooker told him that he had not given him the premium receipt, and Rau promised to take it up to him on Monday, the sixth, and on that day he handed it to Tooker. On July third, Tooker, after some indiscretions in eating, was suddenly seized with an acute attack of colic, from which, however, he recovered. It will be noticed that the following day, July fourth, was a holiday and July fifth was Sunday. On July sixth the insured was at his office the whole day and apparently in good health. That night he was taken suddenly ill and died on July seventh. On July sixth the plaintiff's notes were taken up and paid by a check of the plaintiff's wife to the order of Rau, and on the same day the company's receipt for premium was handed to Tooker. Rau deposited this check in his own bank account, and on July eighth he sent his check to the general agents of the defendant, who subsequently, and after the death of the insured, returned the same to Rau.

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After the death of the insured the other children of the insured and the executors of his will, in consideration of one dollar, assigned to the plaintiff the policy and all their rights thereunder. Proofs of death and interest were delivered to the defendant in the latter part of July, which were received by the company without objection, and the \$5,000 due on policy 598 were paid. The company, on December fourth, waived the making and filing of additional proofs of death under the present policy.

The defendant denies that the first premium was ever paid or that the policy ever had inception as a contract, and claims that if the policy was duly delivered and the premium paid, the policy is null and void by reason of breaches of warranty, its main contention being that there were misstatements or omissions in the application for the policy, in that the insured stated in his application that the last physician consulted by him was Dr. Skiff, in 1880, and that this was untrue, he having consulted other physicians at subsequent periods, as late as the months of June and July, 1896. The issues were tried by the court, a jury having been waived, and judgment was entered for the plaintiff. From this judgment the appeal is taken.

The first question relates to the inception of the policy which required the payment of the premium in advance. The policy provides that the premium is payable at the home office of the company in the city of Philadelphia, or that it may be accepted elsewhere in exchange for the company's receipt signed by the president, vice-president, actuary or secretary. The receipt of the company, signed by the vice-president and countersigned on July 6, 1896, "by S. L. Rau, Agent," was delivered to the insured or his representative on July sixth, after the check had been given to Rau for the payment of the notes of July first.

The application and amendment hereafter referred to are on blanks of the company and are signed by Rau as witness, while the premium receipt, also on a blank of the company, is signed by him as agent, and on the back is a clause authorizing the payment of premiums "to an agent producing a receipt therefor signed by the President, Vice-president, Actuary or Secretary, and countersigned by such agent," and there is evidence tending to show that Rau had acted as agent for the company in obtaining several policies of insurance for other persons and that in some of the cases the policies

were delivered by Rau upon receiving the notes of the insured, without payment of the cash. These facts clothed Rau with apparent authority as an agent of the company. The acceptance by Rau of the notes of the son and the delivery of the policy, ratified as it was by the delivery and acceptance of the wife's check for the amount of the premium and the delivery of the premium receipt on the sixth of July, constituted a waiver of the conditions of the policy as to the payment of the premium in actual cash, and it follows as a legal consequence that the policy had its inception on the first day of July. To this extent Rau was the agent of the defendant, and his acceptance of the notes and check estopped the company to deny the receipt of the premium in accordance with the conditions of the policy.

The other defense, that the policy was null and void by reason of breaches of warranty, is based upon the fact disclosed in the proofs of death, by which it appears that in February, 1896, Dr. Forman, who attended the insured in his last sickness, made the following statement: "Q. Were you the attending physician of deceased before his last illness? If so, for what disease or ailment were you consulted, or did you prescribe for, giving dates? Attended him for some trivial ailment (the nature of which I have forgotten) 1893, Feby. 1896. Herpes Zoster Capitis."

The proofs also contained the following statement: "Date deceased first consulted you professionally? July 3, 1896. Except as above mentioned. What was the nature of sickness or ailment? Obstinate constipation with profound collapse. Duration of last illness? Five days including dates of attack and death. Its predisposing causes, together with history and symptoms present during its progress? Can only designate foecal obstruction of bowel — Intermittent pain — collapse. State the immediate cause of death? Heart failure."

The defendant called Dr. Forman as its own witness and he testified that he professionally attended the deceased for some trifling ailment in 1893. His attention was also called to the proofs of loss signed by him, in which he stated that he attended the deceased in February, 1896, for "Herpes Zoster Capitis," and he was asked for a definition of that disease and whether it was what is commonly known as shingles. The witness declined to answer the question

on the ground that it called for expert testimony. The court stated that witness had "a right to take that position," and the defendant excepted. As the witness was called by the defendant, the exception has no validity. No objection to the testimony was made by the defendant, nor did it move to strike out the entire testimony of the witness, and the exception, under these circumstances, is untenable.

The witness also testified as follows: "If my memory serves me correctly in that proof of loss, I think I stated that I saw him several times in 1896 for some trifling ailment, the character of which I had then forgotten. I think that is practically what is in the proof of loss. I say so now. My statement there was true. I made no memorandum of the character of his illness. I remember it as a trifling indisposition."

In the case of *Chinnery v. U. S. Industrial Ins. Co.* (15 App. Div. 515) this court held that the statement in the application that the applicant had never been under treatment in any hospital or other institution, though technically untrue because the applicant had at one time been in a hospital under treatment for "eye trouble," which appeared to be for the removal of some substance that had become lodged in her eye, was not within the meaning of the policy so as to invalidate it, as it had nothing to do with the general health of the insured, and if it had been known to the defendant, could not possibly have been considered by it as a reason for refusing a policy of insurance to the applicant.

To the intelligence of the ordinary layman, "herpes zoster capitis" is a disease with a high-sounding name, but there is no evidence in the record as to what it is, and a reference to the standard dictionaries discloses the fact that "herpes" is a cutaneous affection which appears in several forms, and is known among the uninitiated as "shingles;" that the use of the word "capitis" locates the disease upon the scalp, while the Greek word "zoster," meaning a belt or girdle, would seem to locate it in the region of the waist. In the evidence the ailment is sometimes called "herpes zoster capitis," and sometimes "herpes capitis," as if there were no distinction. It is, therefore, difficult to discover from the evidence what was the real ailment. Dr. Forman testified that he prescribed a salve or



ointment; that it was for a trifling indisposition, and that Tooker fully recovered from the trouble. When it is considered that the application contained the statement that the application of the insured for policies in the Mutual Life and Equitable Life Insurance companies had been declined, and that it does not appear in evidence that there was any conference on the subject with either of said companies, it is not difficult to deduce an inference that, as the defendant issued its policy after such statement, the defendant would not have refused to issue its policy if it had known what the applicant had suffered with the ailment referred to. Nor is this evidence conclusive against the plaintiff. The witness was called by the defendant, and the jury may possibly have disbelieved his evidence altogether, as they were entitled to do.

In addition to this, Rau, speaking of the time when the application for the policy was made, testified as follows: "Q. Prior to that time, did he state to you anything about the Herpes Capitis? A. He (the insured) spoke to me about some slight scalp ailment, but he did not use any technical term, and I asked him in a general way if it amounted to anything, and he said no. That was all the conversation. It was a little sore on his head for which the doctor had given him a salve. It did not amount to anything; it was then entirely cured. Q. Did he ask you if it was necessary to mention that? A. In this way: I said that it is so unimportant it is needless to mention it; those little things will happen all the time, and we would be busy filling up forms to contain them, every little cold and everything of that sort."

In this transaction which preceded the issuing of the policy, Rau was acting on behalf of and as the agent of the company. His knowledge was the knowledge of the company and his failure to write in the application the statement made to him by the insured cannot be held to militate against the latter. All the more, that there is not in the policy a condition which so often appears in the reports of insurance cases, that the agent taking the application is the agent of the insured and not the agent of the insurer. (*O'Farrell v. The Metropolitan Life Ins. Co.*, 22 App. Div. 495.)

The case does not involve a breach of warranty in the policy. It is at most the omission of a fact, and a fact which the trial court upon the evidence was justified in finding to be a trivial fact.

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A similar question arose in the case of *Dilleber v. Home Life Ins. Co.* (69 N. Y. 256, 263) where the court held: "When the language used in a policy may be understood in more senses than one it is to be understood in the sense in which the insurer had reason to suppose it was understood by the assured. (*Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405.) Conditions and provisos must be strictly construed against the insurers, because they have for their object to limit the scope and defeat the purpose of the principal contract; and as the insurer prepares the contract and furnishes the language used, any ambiguity in the contract must be taken most strongly against him. (*Fowkes v. M. & L. Life Ass. Assn.*, 3 Best & Smith [Q. B.], 917.) We are, therefore, of opinion that it was a question of fact to be submitted to a jury, whether the answer of the assured as to the physicians employed or consulted was honestly and fairly made, or whether a portion of the truth was fraudulently and intentionally suppressed or withheld."

In this connection attention must be given to the form of the application. The clauses must be construed together and the intention and agreement of the parties from the whole instrument. The applicant said: "There is no suppression of known facts." "It is hereby covenanted and agreed that if there has been any suppression or omission of any fact, or if any untrue or fraudulent allegations be contained herein or in the foregoing answers," the policy shall be void. Taken together, these clauses clearly relate to some fraudulent or intentional suppression or omission of any known fact. A simple omission resulting from a lapse of memory would not come within the category. There must have been something indicating an intention to deceive the company and to induce it to enter into the contract in order to void the policy.

Bearing in mind this principle, we find that the original application of January seventh stated as follows: "The last physician I consulted or who prescribed for me was Dr. Geo. B. Skiff, of N. Y. City, in the year 1880, for the sickness here stated, simple diarrhœa, 3 days' duration."

This was amended on March third, before the issuance of the present policy, as follows: "The last physician who prescribed for me was Dr. George B. Skiff." This takes the place of the corresponding statement in the original application, and must be con-

strued as simply stating that the last physician consulted was Dr. Skiff, without giving any date of the consultation or its cause or reason, or the sickness for which he was consulted; and construing this clause strictly against the company, there is no misrepresentation whatever. There is no evidence of the untruthfulness of this statement, as there is no evidence of any subsequent consultation with any other physician previous to the delivery of the policy. The proofs of loss and the evidence show that Dr. Forman attended the deceased in 1893 and in February, 1896, but it does not appear affirmatively that these consultations were subsequent to the unknown and undesignated date of Dr. Skiff's attendance, referred to in the amendment to the original application for insurance. *Non constat* but they were prior to the last consultation with Dr. Skiff, the date of which does not appear.

It is unnecessary to consider any question arising upon the attendance of Dr. Forman upon July third, as this was after the date when, according to our opinion, the policy had its inception.

It is not altogether clear what was the real cause of the death of the insured. The proofs of death state the cause of death as heart failure; that the health of the deceased first began to be affected July third; that the first symptom was simple colic, and the duration of the last illness five days. But there was testimony that the insured, after the first attack, had fully recovered and was attending to his ordinary business, and the learned court has found, as matter of fact, as follows: "I further find that said insured was a man of good health and bodily condition, and had not been sick for years, except from ailments of the most trifling nature, until in the afternoon of July 3rd, 1896, when he was suddenly seized with severe pains and suffered from an acute attack of colic from which he recovered, and the following day was July 4th, a holiday, and July 5th was Sunday, and he was at his office all of the following day, July 6th, 1896, attending to his business and apparently in his usual good health, and that on the night of July 6th, 1896, he was taken suddenly ill and continued ill during the night." This finding was fully justified by the oral and written evidence.

In addition to these considerations, it will be remembered that there was but one application, upon which both policies were issued. This was dated January seventh. The first policy, numbered 598,

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was dated January eleventh. The amendment of the application was dated March third. The present policy was dated May second and delivered July first, and this was after the amendment of the original application. Leach, one of the agents of the company, testified that Rau held policy 598 for over six weeks before he delivered it to Tooker, and this brings the delivery to at least March seventeenth, a time at least eleven days subsequent to February sixth, the time when, in the attending physician's certificate, Dr. Forman certified that he attended the insured for herpes, and these facts were known to the company at the time when it paid the amount of the first policy. And as it paid that policy without objection, it would seem as if it had waived any invalidity or insufficiency of the proofs as to the present policy, since it expressly and in writing, on December fourth, waived any further proofs of death.

The judgment must be affirmed, with costs.

All concurred, except BARTLETT, J., who concurred in the result.

Judgment affirmed, with costs.

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JOHN ENRIGHT, Respondent, v. THE AMERICAN BELGIAN LAMP  
COMPANY, Appellant.

*Action to recover for the loss of profits which would have accrued but for defendant's default — proof insufficient to sustain it.*

A complaint in an action demanded damages for a loss of profits which would have resulted from the manufacture and sale of goods, in which it was necessary to make use of certain patented articles which the plaintiff had loaned to the defendant, and the defendant, on demand, had refused to return. It appeared that the plaintiff had had at all times a large amount of the goods on hand, and he gave no proof that if he had had others he could have sold them. *Held, that, under the circumstances, the plaintiff was not entitled to recover for the loss of resultant profits.*

APPEAL by the defendant, The American Belgian Lamp Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 11th day of February, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 1st day of

March, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown* [*J. Stewart Ross* with him on the brief], for the appellant.

*K. U. McDonald*, for the respondent.

GOODRICH, P. J. :

The action is brought to recover damages for the failure of the defendant to return certain articles which were loaned to it by the plaintiff. The issues were submitted to the jury, which rendered a verdict for the plaintiff. As there were no exceptions to the charge, we are only called upon to decide the questions which arise upon exceptions to the admission and rejection of evidence and to the refusal of the court to dismiss the complaint made on the close of the evidence, on the ground "that no cause of action has been made out, and that there is no such preponderance of evidence upon the claim of special damages that would warrant sending it to the jury."

The plaintiff was a manufacturer of lamps in the city of New York, and the defendant was an importer and manufacturer of similar articles. There had been a fire in the defendant's establishment, and the underwriters took charge of and sold to the plaintiff, at auction, the articles in question, which were known as collars, feeder screws, fillers, etc., and were used in the manufacture of lamps. In August, 1894, and at various times thereafter, up to January 15, 1895, the plaintiff loaned to the defendant, at its request, a large number of these articles, and there is evidence tending to show that, at the time of this loan, the defendant knew that the plaintiff was engaged in manufacturing lamps, and that he used the articles in connection therewith. At the time of the first loan, on August 27, 1894, a receipt for the articles was given by the defendant, in which it was stated: "We agree to return to him sometime during the month of September, 1894." The subsequent receipts did not contain any mention of a time during which the articles were to be returned, and there is conflicting evidence on the subject, the defendant claiming that they were to be returned only on demand, and after reasonable time to import from Belgium where the articles were manufactured under a patent.

It will be observed that this action is not brought to recover damages for the simple value of the loaned articles, but for damages resulting to the plaintiff from his inability to use the articles in the manufacture of lamps, it being claimed that, by the omission of the defendant to return the articles, the plaintiff was prevented from manufacturing, and thereby lost profits which he might have received on the sale of the completed lamps. The law applicable to such an action was well stated in the charge of the learned justice who presided at the trial. He stated, among other matters, as follows: "In the first place it is necessary, under such circumstances, for a plaintiff to prove, as matter of fact, that he did in good faith intend to manufacture the article referred to; to put together these homogeneous parts and make the marketable article to sell; that the person who borrowed from him knew that fact at the time of borrowing, and that, therefore, the possibly enhanced damage which might result from a failure to carry out the bargain and return the articles was contemplated by both parties at the time; that the person to whom he made the loan has failed to live up to the terms of the agreement under which the loan was effected; that there was such a market as would have enabled the lender to sell his articles readily, if he had manufactured them or put them together, and that he would have made the profit which he asserts is the measure of his loss."

On July 1, 1895, the plaintiff made a formal demand that the goods be returned on or before July tenth. The action was commenced on August ninth. The answer was served on August twenty-ninth, and on that day, for the first time and forty days after the demand, the defendant wrote the plaintiff notifying him that a part of the articles had arrived from Belgium and were held subject to his order, and that it expected the balance of the goods to arrive by the middle of September. There is no evidence of any subsequent arrival of the goods, nor of any offer to deliver them, and the offer referred to was made twenty days after the suit was commenced. The answer contained an allegation that the goods had not arrived at the time of the commencement of the action, but that some had arrived and the remainder were expected shortly. The evidence shows that there was cable communication with Belgium, and that mail and transportation time is about ten days. The

defendant was bound, under any circumstances, to use reasonable diligence to fulfill its obligations, and this question was submitted to the jury. The court charged: "Because if the defendant, when informed finally that the plaintiff wanted these articles back, did attempt to procure them from Belgium, and this suit was brought before it had a reasonable opportunity, in your judgment, to procure them and return them to the plaintiff, then, of course, upon that branch of the case the plaintiff fails. You must find all of these things in favor of the plaintiff by a preponderance of evidence to entitle him to a verdict at your hands. If you find any of these questions in favor of the defendant, then the defendant is entitled to a verdict."

It does not appear that the goods could not have been obtained within the forty days, and there was sufficient evidence to justify the jury in finding that reasonable diligence was not used by the defendant to comply with its obligations.

This brings us to the question whether there is evidence sufficient to establish the amount of damages found by the verdict. It is true that actions of this character cast upon the plaintiff a serious burden of proof, as it is impossible for a party always to establish exactly and precisely the amount of his damages, but with this difficulty he must contend. He must show with reasonable certainty that he could have disposed of the manufactured goods, or, possibly, that he was prevented from doing so by some act of the defendant. There is evidence that the articles were patented, and that the defendant controlled the market, and this may afford a reason why the plaintiff did not make up the goods, or was unable to prove that he could have sold his goods, but this condition of things was the same, both at the time when the plaintiff purchased the burners at the sheriff's sale and when the defendant failed to return them.

The difficulty in the case arises from the plaintiff's failure to show that, before the action was commenced, he tried to sell the manufactured lamps, or could have sold them, if he had had them on hand. It appears that he had 700 or 800 lamps which he had not sold. It is true that he says that these were used by him in his retail trade, but it nowhere appears that he tried to sell, or could have sold, any greater number at wholesale, if he had had them to sell, and it also appears that he had enough of the loaned articles on hand to make

up about 100 lamps, and this he had not done. There is evidence that there was a market for lamps, but whether at wholesale or retail did not clearly appear, and the fact that there was a market for such lamps does not dispose of the question, as there was no evidence that the plaintiff could have sold his lamps if he had had them in hand, or that the company was not supplying the entire market demand. Indeed, it would seem from the evidence of the plaintiff that the patented character of the articles and the control of the market by the defendant interfered with and prevented sales. The proof of a market price for the goods would have been sufficient evidence if the action had been for the value of the articles, but it is not sufficient in an action for the loss of resultant profits from the expected manufacture of the goods.

We do not think that this was evidence sufficient to show that any damages had resulted to the plaintiff from the failure of the defendant to return the articles in question. The motion to dismiss the complaint, on the ground that there was not sufficient evidence as to special damages, should have been granted, and this renders unnecessary any further consideration of the other questions in the case.

The judgment and order should be reversed and a new trial granted, costs to abide the event.

WOODWARD, J., concurred.

HATCH, J.:

I concur in the result reached in this case, upon the ground that the complaint seeks the recovery of special damage for the loss of profits on account of the defendant's failure to return the articles which it had borrowed. In this view there was not only an entire failure of proof to show any loss of profits, but there was affirmative proof to show that the plaintiff suffered no loss on that account. He had at all times a large number of lamps on hand which he did not sell. If he did not and could not sell what he had, how could he lose profits upon an addition to that stock? The more lamps he had on hand, the greater would be the carrying charge, and, instead of enabling him to earn profits, would impose a further loss. There is nothing in the case to show the value of the



articles which were loaned, and consequently no basis upon which a recovery could be had for their value, nor is the complaint framed upon that theory. There is, therefore, no ground for the recovery which has been had.

BARTLETT, J., concurred; CULLEN, J., concurred in the result.

Judgment and order reversed and new trial granted, costs to abide the event.

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HUGH DOUGHERTY, Respondent, v. EDWARD F. MILLIKEN and FOSTER MILLIKEN, Appellants.

*Negligence—employers liable for a defect in a derrick erected as a permanent structure.*

In an action charging employers with negligence it appeared that the plaintiff, an employee, was injured because an eyebolt, fastened in the stringpiece of a dock, to which were attached two wire ropes, used respectively to support each of two permanent derricks standing on the dock, broke, as there was evidence tending to show, both because of the insufficiency of the eyebolt and because of the improper method in which it was fastened into the stringpiece, by reason of which one derrick fell, throwing the plaintiff from his position on the top of it, while a load was being lifted on the other derrick, and injuring him.

*Held*, that, the derrick having been erected as a permanent structure, the employers were liable.

APPEAL by the defendants, Edward F. Milliken and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 18th day of June, 1897, upon the verdict of a jury for \$4,000, and also from an order entered in said clerk's office on the 12th day of July, 1897, denying the defendants' motion for a new trial made upon the minutes.

*Perry D. Trafford*, for the appellants.

*Isaac M. Kapper*, for the respondent.

GOODRICH, P. J.:

The defendants were engaged in steel construction, having a plant on the dock at the foot of Clinton street, Brooklyn. The plaintiff was in their employ, under the foreman, Avery. There were two derricks on the dock, about twenty-five feet back from

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the stringpiece and sixty feet apart, one about forty feet and the other about thirty-five feet high. Each had a boom about twenty-five feet long. When the derricks were put up, a week before the accident, the guy ropes were hempen; one of those supporting the smaller derrick had been fastened to an eyebolt on the stringpiece, while the one running to the larger derrick was fastened around a spile near the stringpiece. The day before the accident, Avery, the foreman of the defendants, under whom the plaintiff was working, changed the hempen ropes for wire, and apparently, at the same time, changed the position of the guy attached to the larger derrick from the spile to the same eyebolt which carried the guy of the smaller derrick. In some of the details of this change the plaintiff assisted, although not in the actual making of the guy fast to the eyebolt. When the arrangement was completed there were two wire guys running from the eyebolt to the tops of the two derricks in diagonal directions, so that there were opposite strains upon the eyebolt.

On July 23, 1895, the plaintiff was sent up to the top of the larger derrick to make some changes in one of the other guy ropes attached thereto. While he was in that position a load was being hoisted on the boom of the smaller derrick, when the eyebolt in the stringpiece broke and the derrick on which the plaintiff was, fell, and he was thrown to the ground, receiving the injuries which are the subject of this action.

It is evident that the question of the defendants' liability must depend largely upon the character of the derricks, whether or not they were erected and intended for permanent structures and use; for, if they were permanent, it was the duty of the master to use reasonable diligence to see that they were securely and properly fastened, in a manner suitable for the uses to which they were to be applied.

I think it may be assumed from the evidence that the derricks were intended and erected for permanent use, as it appears that boats and lighters brought iron to the dock, and this was unloaded into the shops of the defendants by the aid of the derricks, all the more that the complaint contains the allegation that the plaintiff was ordered "to go upon the top of a certain derrick which the defendants had and used in and about their business, and which then was in and

upon the premises occupied by the defendants for their aforesaid plant or shops." It may be fairly deduced from the charge of the learned court that the trial proceeded and that the case was submitted to the jury upon that general theory. I find nothing in the evidence inconsistent with this view. In this connection it is to be noticed that the change of the guys from hempen ropes to wire ropes also tended to show that they were intended to be located for permanent use in the position assigned to them. The fastening of the guy to the eyebolt was a part of the permanent erection, and, therefore, a part of the permanent appliance which the master was bound to furnish in such way as reasonably to secure the safety of his employees.

There is no question raised as to the fact that the accident was caused by the breaking of the eyebolt in the dock while a load was being hoisted on the smaller derrick. The plaintiff contended that this resulted from the fact that the eyebolt was screwed perpendicularly into the stringpiece; that only one guy should have been attached to it, and that it ought to have been carried into the timber on a line in continuance of the direction of the strain to which it was to be subjected by such single rope; that it should have gone entirely through the stringpiece, and been there fastened by a nut on the farther side, and that the transverse strain of the two guys running in opposite directions caused the iron to be heated, strained and weakened, and that it was not of sufficient size to stand such pressure. The defendants contended that the accident resulted from the negligence of a fellow-servant, and that the cause of the break was not established by the evidence.

In *Kennedy v. Jackson Agricultural Iron Works* (12 Misc. Rep. 336), decided at the General Term of the Superior Court of the city of New York, the court drew the distinction between the liability of the master in a case where a derrick was set up for permanent use and the case where a derrick was not intended for a permanent structure, but was to be transferred from place to place, wherever the occasion of the work required its presence, and held that as the derrick was not intended to be a permanent structure, but was to be transferred from place to place, the master was not liable, as the case was one where the master had furnished proper appliances and the accident was due to the carelessness or erroneous judgment of the

foreman in setting it up, as in that respect he was a fellow-servant of the plaintiff.

In *Tomaselli v. Griffiths Cycle Corp.* (9 App. Div. 127), where the accident resulted from the breaking of a cast iron bar, which was being used as a beam to hold up tackle with which heavy weights were being hoisted, this court held that: "The obligation was, therefore, imposed upon the defendant to exercise reasonable care and prudence in the selection of this appliance, and to see that it was reasonably suitable and safe for the purpose to which it was applied. This duty was primary, and could not be delegated to a servant, so as to shield the master from liability for damage occasioned through an omission of the servant to properly discharge it."

*Watts v. Beard* (18 App. Div. 243) was a case where a workman was injured by the drawing out of an eyebolt from a ceiling, where it had been placed by a fellow-workman of the plaintiff for a *temporary* purpose. The court said: "It was adopted as a temporary expedient for the occasion — employed as a means to accomplish the purpose then in view, and the use made of it was within the details of the work which the workmen were proceeding to perform. In that view, any negligence to which the plaintiff's injury may have been attributable was not that of the defendants, but was that of his co-employees. \* \* \* Although the engineer was foreman in the work, and the plaintiff acted entirely under his direction, he was, nevertheless, a co-employee of the plaintiff. It does not seem important that the plaintiff personally had nothing to do with the act of putting the eyebolt into the ceiling. It was done in the process of the work, and was incidental to its performance."

This naturally brings us to the cause of the derrick's fall. There is no dispute that the eyebolt broke. There was evidence tending to show that it broke because it was not of sufficient size and strength; that it was improperly placed in a vertical position in the timber instead of being driven through it in the continuous direction of the strain of the guy; that it should have been fastened by a nut at the back of the timber; that only one guy should have been attached to it; that iron, when subject to a transverse strain, is liable to be heated and, so, weakened. It does not appear, however, that any load had been hoisted on the larger derrick after the two guys were fastened to the eyebolt, so that the only strain on the guy to the larger derrick

was the weight of the derrick itself. But the court fully submitted these questions to the jury, saying: "Was the manner of guying, and was the eyebolt itself and the way it was fastened such as furnished to the workmen a reasonably safe and proper appliance, taken in connection with all that appears in the case from the testimony? If it was proper, if it was not unusual, if it was safe, if it was such an appliance as the master was bound to furnish to the workman, then the master's duty ended, and he is not liable here because of the happening of the accident from such inexplicable cause."

The verdict, therefore, establishes as a fact that the master had failed in his duty to furnish a reasonably safe and proper appliance.

The court refused to charge as follows: "If the jury find that the bolt broke because it was inserted in the stringpiece in an improper manner, this was the negligence of the plaintiff, a fellow-workman, for which the defendants are not responsible." There was no error in this refusal, under our view of the duty of the master to furnish proper appliances; that was a duty of the master, and could not be delegated to a servant. This rule is too elementary to need citation of authority.

The court also refused to charge: "It being admitted that the derrick was suitable, and there being no negligence on the part of defendants in selecting the workmen, any negligence of theirs in using or setting up the derrick is the negligence of fellow-servants of plaintiff, for which defendants are not liable." The propriety of the request depended upon the permanent or temporary character of the derrick, and whether the condition of the derrick referred to was before or after its permanent erection. The master's responsibility was not ended when he furnished the different parts of the derricks, the mast, the booms, the guys, the eyebolt, and their place of fastening. It was his duty to assemble these parts in the erection of the finished appliance, so that it should be reasonably safe for the purpose to which it was to be applied. *McC Campbell v. Cunard S. S. Co.* (144 N. Y. 552), cited by the appellant, is not hostile to this view. That was a case where a skid was being temporarily used as a method of carrying cargo from the dock to the gangway of a ship, and the servants of the defendant had improperly tied the mouthpiece to the skid. This was a part of the servants' duty, and the court so held, but that was a temporary structure and

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not a thing set up for permanent use, as was the derrick in the present case.

The only other exceptions which require consideration are those taken to the admission of expert evidence, and I think they do not afford any ground for reversal of the judgment. We think, however, that the verdict was excessive, and should be reduced to \$2,500.

The judgment and order must be affirmed.

All concurred, except CULLEN and BARTLETT, JJ., who dissented and voted in favor of unconditional reversal.

Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulates to reduce the recovery of damages to the sum of \$2,500 and extra allowances proportionately, in which case the judgment as reduced is affirmed, without costs of this appeal to either party.

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JULIA R. SCHMIDT, as Administratrix, etc., of CLIFFORD A. SCHMIDT, Deceased, Respondent, v. THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Appellant.

*Negligence — death of a passenger caused by his swaying while standing in a moving open car and striking a post near the track — expert testimony as to oscillations of cars a month after the accident.*

A passenger upon an open car on an electric railroad, supplied with power from wires running on posts set between the tracks, and less than two feet distant from the floor of the car, had his hat blown off, and rose from his seat in the car to signal to the conductor, when his body swayed from the rough motion of the car, and his head came in contact with one of the poles, and he fell to the floor of the car fatally injured.

*Held*, that it was proper to submit to the jury the question whether, at the time of the accident, the car, by reason of the speed at which it was being propelled, swayed from side to side in such a manner as to endanger the safety of a passenger, occupying that part of the car nearest to the line of trolley poles, who had occasion for any purpose to assume a standing position;

That there was nothing blameworthy under the circumstances in the passenger having risen to signal the conductor.

Testimony of a civil engineer and railroad man as to the vertical and lateral oscillation of cars on the same track a month after the accident, not accompanied by any proof that the conditions as to the load and speed were the same as at the time of the accident, is inadmissible.

APPEAL by the defendant, The Coney Island and Brooklyn Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 1st day of May, 1897, upon the verdict of a jury for \$15,000, and also from an order entered in said clerk's office on the 3d day of May, 1897, denying the defendant's motion for a new trial.

*William N. Dykman*, for the appellant.

*Nathaniel H. Clement*, for the respondent.

WILLARD BARTLETT, J. :

The plaintiff has recovered a verdict of \$15,000 against the defendant for negligently causing the death of her husband, Clifford A. Schmidt, who was a passenger on one of its electric trolley cars on the way from Coney Island to Brooklyn on the afternoon of the 16th day of May, 1895. The motive power on the defendant's line is applied by what is known as the center-post system, the wires through which the electric current is conveyed to the cars being supported by posts set between the two tracks. At the time of the accident Mr. Schmidt was seated at the end of the forward seat of an open car, with his back toward the front and his side next to a guard rail which runs along the side of the car nearest the line of posts. At a point about a mile and a half from the Brighton Beach Hotel, when, according to one of the witnesses, the car began to go so fast that it swayed a great deal, a gust of wind blew off Mr. Schmidt's hat. He arose from his seat, grasping the stanchion of the car at his right hand, and stood for an instant as though to beckon to the conductor. At this moment his body was seen suddenly to sway — although his feet did not leave the floor of the car — his head came in contact with one of the trolley poles and he sank, fatally hurt, down upon the floor of the car.

The learned trial judge charged the jury that if the plaintiff's intestate leaned out of the car, either voluntarily or involuntarily, there could be no recovery in the case. He held, however, that there was evidence from which the jury might find negligence on the part of the defendant and freedom from contributory negligence on the part of the deceased passenger, if they should think that he acted with ordinary prudence, and that his body was thrown outside

the car without any volition on his part by the violence of the car's swaying and plunging, and such swaying and plunging were caused by an unusual and dangerous rate of speed under the existing circumstances and conditions.

Mr. Schmidt was an accomplished musician, who had been a concert master in Mr. Anton Seidl's orchestra. He was earning a handsome income, and no fault is found with the amount of the verdict if the plaintiff is entitled to recover at all. It is earnestly contended in behalf of the appellant, however, that there was no evidence that the rate of speed of the car was excessive or dangerous, and also that the proof conclusively established the negligence of the deceased in voluntarily leaning out of the car and thus bringing his death upon himself.

I do not find it possible to accept either of these views as correct. As I read this record it affords ample basis for a finding that at the time of the accident the car swayed from side to side, in such a manner as to endanger the safety of any passengers occupying that part of the car nearest the line of trolley poles, who had occasion for any purpose to assume a standing position, in view of the fact that the poles were only twenty-three and three-quarter inches from the floor of the car. It may well be inferred that such swaying was due to the speed at which the car was propelled over an uneven track. It does not necessarily follow from the fact that no such accident had ever occurred before that the defendant was not bound to take some care to avert a casualty of that character, if the conditions were such as to suggest a probability of the occurrence. There was nothing blameworthy in the act of the passenger in arising to signal the conductor in consequence of the loss of his hat. Such conduct under such circumstances is almost instinctive, and in the very nature of things can never be the result of conscious forethought. It seems to me that in the management and operation of open cars, in the spring and summer, over such a line as that of the defendant, many cases must occur in which it is entirely proper and to be expected that the passengers will arise from their seats for some momentary purpose, and that reasonable care demands that the cars shall be run with some reference to such probabilities.

With these views I should have no difficulty in sustaining this



judgment were it not for some errors in the admission of evidence upon the trial. It is only necessary to refer to one of these. Richard Schermerhorn, a civil engineer and railroad man, who was called by the plaintiff as an expert, was allowed to state to the jury his observations as to the vertical and lateral oscillation of the cars over the defendant's road about a month after the accident. His testimony on this subject was objected to on the ground that the conditions were not shown to be the same, or the car, or the load upon the car, or the rate of speed. The evidence was received over the defendant's objection and exception, and the witness testified to a vertical oscillation of from twelve to sixteen inches, and a lateral motion of six inches. One of the cars on which he made his experimental observations was admitted to resemble the car upon which the accident occurred in general likeness and dimensions; but he also testified to his experience upon other cars, as to which he could only say that in general appearance they all looked alike. It was error to admit this proof. Unless the conditions were shown to be the same, the fact that a particular car, in June, swayed and plunged while moving over the part of the road where the accident occurred, did not tend to show that another car, in May, swayed and plunged at the same place. The negligence, or absence of negligence, on the part of the defendant, at the time the plaintiff's intestate was killed, depended chiefly upon the manner in which the car was operated, and evidence that a train was run carelessly on one occasion is not evidence that it was so run on another. (*Cohn v. N. Y. Central & H. R. R. Co.*, 6 App. Div. 196.) The case of *Byrne v. Brooklyn City & Newtown R. R. Co.* (6 Misc. Rep. 260; *affd.*, 145 N. Y. 619) does not help the plaintiff, for there it was proved that the condition of things, at the time when the observations were made subsequent to the accident, was the same as existed at the time of the accident.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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ALEXANDER S. KIRKMAN and SARAH KIRKMAN, Respondents, v.  
MAY LOUISE KIRKMAN, Individually and as Administratrix of  
JOHN KIRKMAN, Deceased, Appellant, Impleaded with DOROTHY  
KIRKMAN.

*Testimony as to the value of the good will of a partnership.*

The opinion of an expert as to the value of the good will of a partnership is not competent as evidence.

APPEAL by the defendant, May Louise Kirkman, individually and as administratrix of John Kirkman, deceased, from a final judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 12th day of June, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term.

*Hugo Hirsh*, for the appellant.

*John M. Bowers*, for the respondent.

WILLARD BARTLETT, J. :

This appeal presents the question whether the opinion evidence of an expert is receivable to prove the value of the good will of a partnership. The litigation relates to the affairs of the firm of soap manufacturers known as Kirkman & Son, of which John Kirkman, the appellant's intestate, was a member during his lifetime. The learned judge at Special Term has decided that the good will and trade marks of the concern are worth \$15,000 of which sum the appellant, as administratrix of John Kirkman, is entitled to thirty per cent. The appellant insists, however, that the valuation of the good will should have been larger, and assigns as error the ruling of the trial court, disclosed by the following extract from the record: "Oliver Johnston, called as a witness for the defendants, being duly sworn, testified as follows: By Mr. Hirsh: 'My business is grocer, of the firm of Johnston Brothers, doing business on Nevins street and Flatbush avenue. I have been in that business twenty-six years. I know Mr. Kirkman, the plaintiff. I do know the kind of business that is done by Kirkman & Son, soap manufacturers. I do know the character of their product. I have purchased it

from them. Have done so for about twenty years, I guess. It is a product well and favorably known in the market. And the evidence of that is the sale that we make in our place of that product. I know the business has been well established for years. Q. What, in your opinion, is the value of the good will of that business of Kirkman & Son, where the capital invested is a little over fifty-four thousand dollars, and the profits in nine months declared was about thirty thousand dollars? From your knowledge of the business, the product of the manufactory, the long establishment of that business, what, in your opinion, is the value of that good will? [Objected to as incompetent; objection sustained; defendants except.]’”

I think this ruling was correct. The difficulty of drawing the line which excludes the opinion evidence of experts has often been recognized by the courts, and the decisions on the subject are not readily reconcilable with one another. It seems to me quite clear, however, that the evidence offered in behalf of the appellant in the present case was essentially of the same character as that which was declared inadmissible in *Wakeman v. Wheeler & Wilson Mfg. Co.* (101 N. Y. 205), and *Reed v. McConnell* (101 id. 270), where it was held to be reversible error to allow witnesses to give their opinions as to the value of the contracts which the defendants were alleged to have broken. “Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence.” (*Ferguson v. Hubbell*, 97 N. Y. 507.) So in the present case, after all the elements going to make up the good will of the partnership and tending to fix its value had been proved as matters of fact before Mr. Justice GAYNOR, the learned judge was quite as well qualified as was the appellant’s witness to estimate correctly what the good will was worth. The determination involved no special knowledge existing in reasons rather than in descriptive facts, and hence the assistance of expert opinions was not required. (See *Schwander v. Birge*, 46 Hun, 66, 69, 70.)

In behalf of the appellant reference is made to the well-known case of *Mitchell v. Read* (84 N. Y. 556), in which one of the questions was the value of certain renewal leases of the Hoffman House in the city of New York. Many witnesses of experience in the

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hotel business were permitted to give opinion evidence as to such value, including the good will of the hotel, against the objection and exception of the defendant. I have examined the appeal book in that case and find no instance in which any objection was made which raised the question of the competency of opinion evidence in respect to the value of the leases. The principal contention of the defendant was that the witnesses should not be allowed to include the good will in their estimates; and the case does not support the position of this appellant, for the point here relied upon was not raised or considered there. (Court of Appeals Cases, vol. 406, Brooklyn Law Library.)

In *The Matter of Randell's Estate* (8 N. Y. Supp. 652) the surrogate of Rockland county took expert evidence as to the value of the good will of a business, but there is nothing in his opinion to indicate that the admissibility of opinions was questioned. The appellant also cites the case of *The Cortland Howe Ventilating Stove Co. v. Howe* (36 N. Y. Supp. 701), where a witness, after giving testimony showing his familiarity with stoves and their manufacture, was allowed by the referee to state the value of a certain patent for stoves against the objection and exception of the defendants. The General Term of the fourth department thought that "the witness was sufficiently familiar with the subject-matter involved in the question to render his evidence competent. The force and effect to be given thereto were for the referee to determine, after all the facts disclosed by him were considered." From this language it would seem that the objection related to the extent of the witness' expert knowledge concerning stoves rather than to the propriety of receiving opinion evidence at all, in order to ascertain the value of a stove patent; but even if the objection did go to this full extent, I should be unable to agree that it was properly overruled.

I think we ought to affirm the judgment.

All concurred.

Judgment affirmed, with costs.

GEORGE D. SWEETSER and Others, Appellants, v. MARY A. DAVIS  
and Others, Respondents.

*General assignment — ratification by moving for a new assignee — an estoppel by judgment must be mutual — an assignment not set aside for frauds upon it — insufficient proof of partnership.*

*Seemle*, that where judgment creditors of a debtor who has made an assignment for the benefit of her creditors make a motion to remove the assignee and substitute another person in his stead, they thereby ratify the assignment, and are estopped from subsequently attacking it as fraudulent.

A judgment, based upon the existence of a partnership relation between a mother and her son, and a confession of judgment by them, in each of which it is stated that they are partners, are not effective by way of estoppel as to an assignee for creditors under a general assignment made by the mother — there being no privity between the parties in the judgment and the general assignee, or between them and the creditors represented by the general assignee.

What are frauds upon a general assignment, as distinguished from frauds in it, and do not require it to be set aside, considered.

What proof is insufficient to establish the existence of a partnership between a mother and her son, considered.

APPEAL by the plaintiffs, George D. Sweetser and others, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Suffolk on the 29th day of December, 1896, upon the decision of the court rendered after a trial at the Suffolk Special Term dismissing the complaint.

The action was brought to set aside a voluntary assignment for the benefit of creditors on the ground that said assignment was fraudulent and void.

*Stillman F. Kneeland*, for the appellants.

*Walter H. Jaycox*, for the respondents.

HATCH, J. :

It is claimed by the defendants that, as the plaintiffs moved for the removal of Davis as assignee and for the appointment of Fanning in his place, they thereby elected to ratify the assignment, and by proceeding thereunder are now estopped from attacking it as fraudulent. Such undoubtedly is the law. (*Terry v. Munger*, 121 N. Y. 161; *Moller v. Tuska*, 87 id. 166.) The point, however, is not available upon this appeal, for the reason that the defendant has

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failed to have proof of the fact inserted in the case. All that appears upon this subject is the allegation in plaintiff's complaint that Fanning was substituted as assignee in place of Davis by an order of the court, and the admission of such allegation in the answer. But these averments contain no statement that such substitution was procured by the plaintiffs, which is the essential fact. The proceedings themselves do not appear, and the case states that it contains all the evidence given upon the trial. This point, while conclusive, is not available. We are, therefore, brought to consider the other questions in the case.

Prior to 1890, John C. Davis, the husband of Mary and father of Eugene, carried on business in partnership with one R. T. Skidmore, his son-in-law. Davis died in 1890, leaving no will. His family then consisted of his wife, two daughters and the son Eugene. No administrator was ever appointed of the estate, nor has any settlement of it ever been had. After the death of John C. Davis, the heirs united in a conveyance of the whole estate of John C. Davis to his wife for life. The business of the firm was continued after the death of John C. Davis, under the firm name of Davis & Skidmore, until March 1, 1892, Mrs. Davis succeeding to the interest of her husband. On the date above named Skidmore retired from the firm. Thereafter and in January, 1895, Mrs. Davis and the children, including Skidmore's wife, executed and delivered to Skidmore a mortgage upon real property formerly owned by John C. Davis, to secure the payment of the sum of \$5,000. The consideration for this mortgage was a \$3,000 note given by Mary and Eugene Davis for the stock in the store, a claimed indebtedness of John C. Davis, which Skidmore paid, and \$500 in cash paid to Mary or Eugene Davis. From and after March 1, 1892, the business was conducted under the name of Davis & Son. On the twenty-eighth of the last-named month Mrs. Davis executed a power of attorney to Eugene to receive and collect the demands due the estate of John C. Davis, and also "to manage, transact and continue the store business for me, in company with Davis & Son." No written agreement of partnership was ever entered into between Mrs. Davis and her son, or between herself and any one else after Skidmore retired from the business, and there is no proof of any partnership, except it may be inferred from the acts of the parties and their declarations.

The stock consisted of personal property, and there was added in money \$1,300, the proceeds of some real estate belonging to the estate which was sold, and the money placed in the business. It does not appear whether or not, in the deed which conveyed the life interest in the property of the estate to Mrs. Davis, she relinquished her dower right or interest in the personal property. Nor does it appear that there was any arrangement between Eugene and his mother, or between either and the sisters, in respect of the property, aside from the conveyance of the life interest. Eugene paid no money for the business, so far as appears, and Mrs. Davis and the heirs joined in the mortgage which secured the payment of Skidmore's interest. There is nothing to warrant the conclusion that Eugene had acquired any interest in his father's estate which was not common to the other heirs, unless we conclude that his mother was vested with title to the property used in the business, and that he acquired some right by management of it. It is quite clear that upon this subject there was an utter absence of agreement between the parties, while it is certain that the \$1,300, the proceeds of the real estate, must have been the joint interest of all, in the absence of any agreement, and the \$5,000 for Skidmore's interest was equally burdened upon them all. We do not determine any of these questions, nor is it necessary that we should. We call attention to the facts as bearing upon the partnership claimed to exist between Mrs. Davis and her son.

On April 20, 1895, Mrs. Davis executed a general assignment for the benefit of her creditors to her son Eugene. He, as we have already seen, was removed, and the present defendant, Fanning, substituted in his place. This action seeks to set aside this assignment upon four grounds: *First*. That the assignment was fraudulent in having been made to Eugene Davis, who was a partner with his mother. *Second*. That Eugene Davis was preferred as a creditor. *Third*. That a large claim against Skidmore was withheld from the schedules. *Fourth*. That the execution of the mortgage to Skidmore was fraudulent.

We have already considered some features applicable to the first question. The proof relied upon by plaintiffs to sustain their attack in this regard consists in declarations made by Mrs. Davis and Eugene when examined in proceedings supplementary to execution, after the

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execution of the assignment, some of which were reiterated upon the trial, and the further proof that goods were purchased by Davis & Son in the conduct of the business, for which judgment was subsequently obtained against Mrs. Davis and Eugene under an allegation of the complaint that they were partners, and also a confession of judgment for goods sold, in which it was reiterated that they were partners. So far as the first species of proof is concerned, assuming it to be admissible, which is doubtful (*Scofield v. Spaulding*, 54 Hun, 523), the case discloses that none of it was received against the defendant Fanning. The oral proof given upon the present trial by Eugene Davis was, by express ruling, so far as it related to his declarations and proof given in supplemental proceedings, limited as affecting him alone. The defendants excepted to the ruling, but the plaintiffs acquiesced therein, and the same is true of Mrs. Davis. So that there is nothing contained in such proof which in anywise impeached the title of the assignee, as none of it was received against him and could not, therefore, operate against the title held by him. Assume, however, that it is so available, and we think it presented a question of fact. Both Eugene and his mother swore that no partnership existed between them, but that Eugene was employed upon a salary to manage the business. True, they also said that Davis & Son was a partnership comprised of the mother and son. But the court was not concluded by that statement, and, in view of the peculiar relations existing between the parties, to which we have before adverted, we are not at all satisfied that the court's conclusion thereon was wrong; on the contrary, we think it was justified by the evidence.

The remaining consideration upon this branch of the case relates to the conclusiveness of the judgment obtained by the plaintiff against Mrs. Davis and Eugene. It is settled by authority that, in order to render a judgment effective by way of estoppel, it must operate mutually. (*Townsend v. Van Buskirk*, 22 App. Div. 441.) In the present case there was no privity between the parties in the judgment and the defendant Fanning, or between them and the creditors whom he represents. It was not, therefore, binding as an adjudication upon him. (*Railroad Equipment Co. v. Blair*, 145 N. Y. 607.)



So far as the preferred claim of Eugene W. Davis is concerned, there was evidence which warranted the court in finding that this claim was for salary, and that his relation to the business entitled him thereto.

As to the third and fourth claims, they are, if anything, frands upon the assignment, and do not constitute a fraud in the assignment, and may not, therefore, be made the basis for setting it aside. (*Loos v. Wilkinson*, 110 N. Y. 195.)

If the mortgage is fraudulent it rests with the assignee to bring an action to set it aside, and if any property exists which has not found place in the schedules it is the duty of the assignee to discover and account for it. The assignee is appointed for such purpose.

These views lead to an affirmance of the judgment.

All concurred.

Judgment affirmed, with costs.

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WILLIAM JEREMIAH, Appellant and Respondent, v. ROSINA A. PITCHER, Respondent and Appellant.

*Specific performance of an oral agreement by which a daughter promised to convey lands, for which the father had paid, as he might direct.*

A real estate dealer having an insane wife and wishing, in the pursuit of his business, to deal in real estate free from any claim of dower therein on the part of his wife, who was incompetent to join in a conveyance of it, purchased property in the name of his daughter upon her promise to convey it as he might thereafter direct, paid the purchase price in part in cash and in part by a mortgage signed by his daughter and himself, which mortgage was afterwards paid by him, collected all the rents and appropriated them to his own use without any protest on the part of his daughter, and paid all taxes and water rents on the premises.

*Held*, that the transaction was an agreement fully performed on the father's part, and did not come within the Statute of Uses and Trusts, declaring that where a grant is made to one person and the consideration is paid by another, no trust shall result in favor of the party paying the purchase price;

That a court of equity would decree specific performance of the contract.

CROSS-APPEALS by the plaintiff, William Jeremiah, and by the defendant, Rosina A. Pitcher, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on

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the 19th day of July, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term.

*P. H. Vernon*, for the plaintiff.

*Henry Major*, for the defendant.

WOODWARD, J. :

This action was brought to establish a trust in favor of the plaintiff, and it is alleged that in 1877 and 1879 the plaintiff purchased certain real estate in the city of Brooklyn; that before closing such purchases he entered into an agreement with this defendant, who is his eldest daughter, whereby the title to the property was to be taken in her name, she agreeing to convey it upon the order of the plaintiff; that, relying upon this promise, the plaintiff purchased the property and caused it to be conveyed to the defendant, but that subsequently, on demand being made for the conveyance of the property, she refused to comply with the agreement. The defendant answering, denies the alleged agreement and sets up the Statute of Frauds, the Statute of Limitations, and the separate and distinct defense that the conveyance was intended as a gift or advancement to her as plaintiff's daughter.

It appeared upon the trial that the plaintiff in this action was, from 1867 to 1887, a real estate and insurance agent, doing business in the city of Brooklyn. His family consisted of a wife and three daughters, the defendant in this action being the oldest. In 1873 the wife of the plaintiff became insane, remaining in that condition up to the present time, being confined in a private asylum. Upon the retirement of the mother from the head of the household, the defendant succeeded to her place, taking charge of the home and assuming the responsibilities incident to the position. Her relations thus took on the united aspects of a wife and daughter, in so far as the business affairs of the family were involved. The plaintiff, charged with the duty of the support and maintenance of his family, was confronted with the fact of his wife's insanity, thus rendering her incapable of releasing her dower interest in realty which might come into his possession, and for the purpose of making a profitable use of his capital and bettering the condition of himself and family, he entered into an agreement with his daughter to take the title to

the property in dispute, and to transfer the same to himself or to such third parties as he might direct. In pursuance of this agreement the plaintiff purchased the property, causing the title to be placed in the daughter. He paid a part of the purchase price, and the daughter gave mortgages in which the plaintiff joined to secure the remainder. These mortgages were subsequently paid by the plaintiff, who entered into possession of the property, made improvements, paid the taxes and water rates, collected the rentals, appropriating them to his own uses without protest on the part of the defendant up to the time of the commencement of this action.

The trial court found substantially this state of facts, but decided that no use or trust resulted to the plaintiff by reason of his payment of the purchase money, and that the trust could be proved only by a writing, the alleged agreement with the daughter being oral. It was decreed, however, that the plaintiff be subrogated to the ownership of the mortgages which he had paid and that they be liens in his hands, and that the plaintiff have a "lien for the mortgages and taxes paid by him," and that, unless the amount be agreed upon, it be referred to an attorney to compute and state the same.

The plaintiff appeals from so much of the decision as denies the existence of a trust, and the defendant appeals from that part of the decision which gives the plaintiff a lien upon the property for his mortgage payments, interest, etc.

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction," says Judge ANDREWS in delivering the opinion of the court in the case of *Wood v. Rabe* (96 N. Y. 425), "which, taken together, in our opinion, entitle the plaintiff to maintain this action. One is that it will not permit the Statute of Frauds to be used as an instrument of fraud, and the other that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. 'The Statute of Frauds,' observes Lord REDFORD in *Bond v. Hopkins* (1 S. & L. 433), 'says that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged therewith, and yet the court is in the daily habit of relieving where the party seeking

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the relief has been put into a situation which makes it against conscience in the other party to insist on a want of writing so signed, as a bar to his relief.' ”

The case now before us clearly comes within these rules. The plaintiff in this action, charged with the duty of providing for himself and family, and of maintaining his unfortunate wife in a private asylum, desired, in the pursuit of his business as a dealer in real estate, to become possessed of certain property in the city of Brooklyn. If he purchased this property, taking the title in his own name, it vested a dower right in his insane wife, who could not release such claim. The result would be that he would have tied up his capital, and would not have been able to give a clear title to a purchaser. In this dilemma he entered into an agreement with his daughter to take the title and to convey the property whenever he should direct, this action being mutually advantageous, and enabling the father the better to provide for the comfort and well-being of his family. This trust could not have been declared in the deed, or in other written agreement, without defeating the very purpose for which it was intended; the moment this plaintiff became possessed of an equitable interest in real estate, that moment the wife became a necessary party to its alienation, and the conveyance of a trustee could not give a clear title. It was absolutely necessary then, if this plaintiff was to make use of his capital in the purchase of this real estate, without putting it out of his power to make use of it to the best advantage in the conduct of his business, that he should find some one whom he could trust with the absolute title. The daughter, who had succeeded to the place of the unfortunate mother in the household, and who had an interest in common with the other members of the family in the success of the business undertakings of the father, became the natural recipient of this confidence, and the plaintiff having, on the strength of this oral agreement, performed his part of the contract in good faith, having parted with his money upon the assurance of his daughter that she would convey the property whenever he should so direct, this agreement being acquiesced in by her for a long period of years, during which time the father regularly collected the rents, paid the taxes, water rates, etc., the defendant cannot now be permitted to make use of the Statute of Frauds to violate the confidence thus reposed,

and to possess herself of the property which was purchased out of the moneys of the father, and to which she can have no higher claim than those of her sister.

The Statute of Uses and Trusts does not inhibit a trust to a party paying the purchase money. It merely declares that no trust results from the payment, and that a grant of real property for a valuable consideration to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration. (Stat. of Uses & Trusts [1 R. S. 728], §§ 51, 52.) There were no creditors; the plaintiff comes into court and establishes a state of facts which precludes the idea of fraud in so far as he is concerned, and while it is not contended that the trust results from the payment of the purchase money, a court of equity is justified in giving the fact consideration in connection with other circumstances, in determining what its judgment in a given case shall be.

This view of the case was taken by Justice HAIGHT in the General Term of the fifth department, in the case of *Gage v. Gage* (83 Hun, 362), where he says: "Section 51 of the Statute of Uses and Trusts (1 R. S. 728) provides that 'where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.' The next section has reference to creditors and has no bearing upon the question under consideration. We do not understand the provisions of this statute to have any application to a case where an express trust has been created or where equities have arisen by the agreement of parties, but that it only has reference to a case in which there exists no express trust or equities other than the payment of the consideration by a person other than the one who takes the title. No trust shall result from that act alone. Bearing in mind this distinction no great conflict will be found in the authorities."

In the case of *Robbins v. Robbins* (89 N. Y. 251) the court, speaking through Judge DANFORTH, discusses a case similar in some respects and involving the same principle as the one at bar. Robbins, Sr., purchased a certain plot of land, taking the title in the

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name of his employee, Fay, with an oral agreement that it should be conveyed upon his order. Subsequently the father requested Fay to transfer the title to his son. This was done, with an oral agreement between the parties that the son was to hold the property on the same terms and conditions as those under which Fay had held it, the father all the time retaining possession of the estate. Finally the father sold the property to a third party, and took in partial payment a mortgage upon the premises, which mortgage was made payable to the son who conveyed the title. The father took the mortgage and other payments, and the son brought an action to recover the mortgage, claiming ownership because of the title having been vested in him without the formalities prescribed by the statute. In commenting upon this case Judge DANFORTH says: "The plaintiff's application is to the equitable jurisdiction of the court; but a case suggesting fewer considerations likely to influence a court of equity in its favor, or more opposed to the rules and maxims by which such a tribunal must be guided than the one on which he relies, has not been brought to our attention. In the diversity of causes of action it seldom happens that one is found which has no other support than an admitted breach of confidence and violation of trust reposed by a father in his son." Continuing in the same case Judge DANFORTH, after quoting the declaration of the court in another case, that "the Statute of Frauds was never intended to prevent a court of equity from giving relief in case of a plain, clear and deliberate fraud," says: "The same principle has been frequently acted upon by this court (*Ryan v. Dox*, 34 N. Y. 307; *Wheeler v. Reynolds*, 66 id. 227), in both of which cases a full and careful examination was made of the reasons and authorities on which it rests. Indeed, the decisions are all one way. They establish as a fundamental doctrine of a court of equity that the Statute of Frauds was not made to cover fraud. In the cases especially referred to the wrongdoer was forced into court."

The case at bar does not come within the Statute of Frauds; it is a parol agreement fully performed on the part of the plaintiff. He has paid the purchase price of this property, entered into possession, received the rentals and other incomes, paid the taxes, discharged the purchase-money mortgages, making use of the property in his business as a dealer in real estate for the benefit of himself and

family, relying upon the promise of his daughter to reconvey such property upon his order, and the defendant cannot now plead the Statute of Frauds to protect her in the ownership of this property. The transaction took place under circumstances which made it impossible, without defeating the end which was sought, to have the trust appear in writing; under circumstances which peculiarly obligated the daughter to accept the trust, and the plaintiff having parted with the legal title to his property, with no intent to defraud, but to enable him to carry on his business advantageously, and thus to provide for his unfortunate wife and his family, a court of equity would fail in its duty if it refused to decree a specific performance on the part of the defendant of her part of the agreement. This view of the case is fully sustained by the authorities.

The conclusions here reached render it unnecessary to determine the questions involved in the defendant's appeal.

The judgment, in so far as it denies the existence of a trust is reversed, and the defendant is directed to make such conveyance of the property in dispute as the plaintiff may order.

All concurred.

Judgment, so far as appealed from by the plaintiff reversed, and judgment directed in favor of the plaintiff, declaring that the defendant holds all the real estate described in the complaint in trust for the plaintiff, and that the said defendant convey the same to the plaintiff, or to such person as he may appoint, with costs of the action and of this appeal to the plaintiff. Judgment on defendant's appeal affirmed.

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FLOYD S. CORBIN, Appellant, v. CASINA LAND COMPANY and Others,  
Respondents.

*Injunction order — review of an order by a co-ordinate branch of the same court — renewal of a motion for an injunction, made on an amended complaint, regarded as a new application — security which may be demanded on granting it.*

Only unusual conditions, such as fraud or collusion, can justify a co-ordinate branch of the same court in reviewing an order already made by that court.

After the denial of a motion for an injunction in an action, an application for an injunction subsequently made upon an amended and supplemental complaint,

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framed upon a different theory, raising new issues and demanding new relief, is to be regarded as an original application and not as a review of the order previously made.

An order, modifying an injunction order, by directing the plaintiff to file an undertaking conditioned to pay any indebtedness which may be found due to the defendants, either in the pending action or in any other action or proceeding in which the same may be determined, is too broad; it should be limited to any amount which was the subject of the controversy or any amount which arose out of, or was connected with, it.

APPEAL by the plaintiff, Floyd S. Corbin, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 24th day of August, 1897, modifying an injunction order theretofore granted in the action, and directing the plaintiff to file an undertaking conditioned to pay any indebtedness that may be found due to the defendants in the action, or in any other action or proceeding in which the same may be determined.

Also an appeal by the plaintiff, Floyd S. Corbin, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 31st day of August, 1897, enjoining the plaintiff from removing, selling, or in any way disposing of any sand upon the premises mentioned in the pleadings in the action during the pendency thereof.

Also an appeal by the plaintiff, Floyd S. Corbin, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 26th day of November, 1897, setting aside an injunction granted to the plaintiff in all respects except as the same had been modified.

*Roger M. Sherman*, for the appellant.

*W. W. Culver*, for the respondents.

HATCH, J. :

The papers upon which the plaintiff moved for and obtained the injunction which restrained the defendants from interference with his possession of the premises were essentially different from those upon which the first application for an injunction was made and



denied. The amended and supplemental complaint was framed upon a different theory; the issues raised thereby were changed, and the demand was for other and different relief. The papers presented in connection with this complaint contained new and different allegations; the facts were stated with more of amplification and were supported by additional proof.

While the facts were in many respects the same as appeared upon the first application, yet they were so far changed as in all substantial respects to constitute the motion an original application. No question could, therefore, arise in respect of the order that should be made being in conflict with the decision denying the first application. This removes the question from the domain of being a review of the order previously made. There can be no doubt but that, upon such motion, the judge had before him a perfectly proper application, and one that he was authorized and required to determine. It is also clear that the court was authorized to grant the relief asked. The papers were sufficient for that purpose. A case was, therefore, presented where it became the duty of the court to judicially determine whether the facts presented a proper case for an injunction order to issue.

It was quite evident that all of the questions of which the case permitted could be disposed of and settled with a due regard for the rights of each party in the action which was then pending, and, if the defendants needed the protection of the court in order to compel an observance by the plaintiff of the covenants contained in the agreement, there was little difficulty in procuring such relief upon a proper case. We are not on this appeal called upon to determine the sufficiency of the case as made. It is sufficient now to say that a case was made where the court was authorized in the exercise of a judicial discretion to grant an injunction. This being so, it did not fall within the authority of a court exercising co-ordinate jurisdiction to interfere with the discretion thus exercised. The exercise of such authority is against the settled policy of the law and an orderly course of procedure. We do not deny but that power exists in one court to vacate an order made by a co-ordinate branch of the same court. Fraud and collusion or equivalent conditions may operate in such form as to make such a course proper. (*Wilson v. Barney*, 5 Hun, 257.) The exercise, however, by one judge of authority in

review of the discretion exercised by another, to the extent of vacating the orders and determination of the latter, is of such doubtful propriety as to have been uniformly denied whenever the question has arisen; it is fraught with consequences that may be serious, imperils the stability of an orderly course of procedure in the administration of justice, and is destructive of the dignity and decorum which should attend upon judicial determination. The review of this question by Mr. Justice DANIELS is comprehensive and salutary. (*People v. Nat. Trust Co.*, 31 Hun, 20.)

The order which vacated the order of the learned judge granting the injunction order was, in substance and effect, the result of a review of the case upon which the judge had exercised his discretionary power. So far as there was change in the proof, it did not operate to change this result. The affidavit setting forth a declaration alleged to have been made by the plaintiff to use the injunction for an improper purpose was quite insufficient upon which to base the order that was made, whether made before or after the injunction was granted. The court had the control of its orders, and it may be safely assumed that its injunctions will not be used for an improper purpose, whatever be the declaration of a party. The right is not affected thereby, if a case exist for the relief asked. If orders are improvidently or improperly made, resort must be had to the usual course of procedure to correct the error, and appellate tribunals are created for that purpose.

The second order required the plaintiff to execute a bond conditioned to pay any indebtedness that might be established in any action or proceeding brought by the defendants against him, or be prohibited from moving or selling any sand. This was quite a sweeping requirement, as it did not limit the plaintiff's liability for any amount found due, which was the subject of this controversy, or which arose out of or was connected with it. In terms it covers any liability for any cause which might be established. There existed no authority in the court to exact such a bond, as no such bond is authorized by law. But it does not follow from all that has preceded that the learned justice was without right to exercise any power in the premises. In the notice of motion asking that the injunction be vacated the defendant also asked that the plaintiff be required to give adequate security in the premises. This application

was not only proper, but was an essential requisite in order to properly protect the defendants in their rights. The injunction order left the plaintiff at liberty to continue the removal and disposition of the sand, and for this privilege the defendants were entitled to security by way of indemnity for the damage which might be sustained in this regard pending the action. The granting of this relief in no wise interfered with any determination which was made when the injunction order was granted. While the order as made in this regard is broader than anything to which the defendants showed themselves entitled, yet to some extent relief in this direction is proper. The affidavits upon the part of the defendants tend to establish that there may exist a considerable indebtedness for sand and other personal property, the former of which the plaintiff may remove and sell, and the latter of which he has a right of use. We think, therefore, that, in addition to the usual undertaking upon obtaining an injunction which the plaintiff has given, he should furnish to the defendants as additional security an undertaking, with sufficient surety, to be approved by a justice of the Supreme Court, in the sum of \$2,000. This undertaking must be conditioned to secure the payment by the plaintiff of any sums for sand or other charge which may arise by reason of his continued occupation of the premises pending the action. The second order, modifying and vacating the first injunction order, must also be reversed, for the reasons already stated.

The orders vacating the injunction should be reversed, with ten dollars costs and disbursements of this appeal.

The order restraining the plaintiff for failure to execute a bond should be modified in accordance with this opinion, and until the execution, approval and filing of said undertaking the injunction order granted to the plaintiff should remain inoperative.

All concurred.

Order resettled by the court, of its own motion, by adding thereto, "and until the execution, approval and filing of said undertaking, the injunction order heretofore granted by Mr. Justice DYKMAN is in all respects suspended, and shall be inoperative."

# Cases

DETERMINED IN THE

## SECOND DEPARTMENT

IN THE

### APPELLATE DIVISION,

March, 1898.

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WILLIAM W. PENFIELD, Appellant, v. THE CLEVELAND, CINCINNATI,  
CHICAGO AND ST. LOUIS RAILWAY COMPANY, Respondent.

*Railroad — expulsion of a passenger who has entered a station by a prohibited way — the company may do a protective but not a punitive act — the fact that the station is managed by another corporation is immaterial.*

A passenger on a railroad train, who had properly alighted therefrom at a way station, in attempting to get upon the train again, without fault on his part or that of the railroad company, got upon the wrong car and was carried out of the station yard. He returned to the station yard along the line of the tracks, and, after having entered it, and when within 100 feet of his train, was compelled by the station officer to retrace his steps and to go around and enter the station through the ordinary entrance, in consequence of which he lost his train. A rule prohibited entrance to the station along the line of the tracks because of the danger attending the crossing of them.

*Held*, that, as the passenger was in the station and had already encountered the danger of crossing the tracks when ejected, his ejection simply exposed him again to this danger, and was, therefore, not a protective but a punitive act on the part of the station officer, who, in doing it, exceeded his powers and those of the railroad company;

That it was no defense to the railroad company, which was bound to furnish a station to its passengers, that the station in question was a union station under the management of another corporation.

APPEAL by the plaintiff, William W. Penfield, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 18th day of November, 1897, upon the report of a referee.

*Henry W. Smith*, for the appellant.

*Henry L. Sprague*, for the respondent.

CULLEN, J. :

The plaintiff was a passenger on one of the defendant's trains, his intended journey being from Greencastle, Indiana, where he first boarded the cars, to New York city. When the train arrived at Indianapolis the plaintiff, with the consent of the conductor, left the train and went into the reception room of the station to obtain some baggage which he had previously left there, and to secure his sleeping car ticket. On his return he found the train had been moved, and was directed by the conductor to a standing car as being the car which he should take. Finding the vestibule door of this car locked, he went on the platform of the next car to it, a dining car, from which to seek entrance into his own car. While on the platform of the dining car that car was moved several hundred feet away to a point outside of the station. The plaintiff thereupon went back along the tracks and entered the station, and when within the station was expelled from it by a station policeman, who informed him that the rules forbade any one entering the station from that direction. The plaintiff then entered the station through the ordinary entrance, but found when he reached there that his train had left. This action is brought for his expulsion by the officer.

We shall assume, as held by the learned referee, that there was no negligence on the part of the defendant in directing the plaintiff to his car, or in moving the dining car away. At the same time we see no negligence on the plaintiff's part in seeking to enter the car by the means which he adopted. In that view the fact that the plaintiff was carried out of the station was simply an accident, for which neither party was responsible. We also agree that the rule prohibiting passengers from entering the station along the tracks was reasonable, and that the defendant was justified in enforcing it. But in our opinion the interference of the defendant's employee came too late. The plaintiff testified that he had proceeded within the station a distance of about 100 feet, and was within 100 feet of his train when he was ejected by the station officer. I find no evidence in the case contradicting this statement. The policeman says that he saw the defendant going into the west end of the union

station, and that he was standing right at the end. He further says that he ejected the plaintiff, but where the plaintiff then was he does not state. From this evidence it is clear that the plaintiff was within the station when the officer sought to remove him. The station superintendent testified that the rule prohibiting entrance into the station through the west end was established to prevent the danger which would occur to passengers in crossing the tracks which it was necessary to traverse in order to reach that end of the station. There seems to have been no danger after the party had entered the station, nor any rule against a person who had entered the station through the ordinary means of ingress from being at the precise point where the plaintiff was when he was ejected. Therefore, the plaintiff was in no way in the wrong in being where he was at the time of his ejection, but simply in the manner in which he had reached that position. We think that under these circumstances the case falls within the principle of *Huerstel v. N. Y. & Harlem R. R. Co.* (1 City Court Rep. 134); *Smith v. Manhattan Railway Co.* (45 N. Y. St. Repr. 865; affd. in Court of Appeals on the opinion of PRYOR, J., below, 138 N. Y. 623.) In the latter case it is said by Judge PRYOR: "Undoubtedly the defendant has authority to enforce observance of its regulations, but by preventing, not by punishing, the breach of them. The defendant has no power of retribution, and is incapable of compelling conformity to its rules by the imposition of a penalty. But the ejecting plaintiff for an act already accomplished would have involved a forfeiture of his right to be carried on that train. Only by present, or prospective, and not by past misconduct, does a passenger lose his privileges."

Here the action of the station officer was clearly punitive and not protective. The very reason of the rule was to guard against the danger which passengers must undergo in crossing the tracks to approach the station from this direction. The result of turning the plaintiff out of the station was to compel him to recross the very tracks the danger of crossing which the rule was established to prevent.

The station at Indianapolis was a union station for the accommodation of several railroad companies. It was managed through the medium of a distinct corporation, the control and ownership of which was in the several railroad companies. The provisions for

stations is as much a part of the business and duty of the railroad company as furnishing the trains or roadbed. It is the duty which proceeds both from its calling as a common carrier and from the contract which it enters into with its passengers. Such duty is analogous to a duty imposed by statute, from liability for the non-performance of which the company cannot be relieved by delegating the duty to an independent contractor. However it may be as to third persons, as between the defendant and its passengers the station officer at Indianapolis was the defendant's servant, for whose acts, within the scope of his duty and employment, the defendant was liable. (*Pennsylvania Co. v. Roy*, 102 U. S. 451; *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402.)

The judgment appealed from should be reversed and new trial granted before a new referee, to be appointed at Special Term, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the event, before a new referee, to be agreed on by stipulation or appointed at Special Term.

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PATRICK H. FLYNN, Respondent, v. THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and Others, Appellants, Impleaded with THE BROOKLYN TRUST COMPANY.

*Railroad corporations — execution of a mortgage to secure bonds — limitations of the power to borrow money.*

The provisions of the Stock Corporation Law (Laws of 1892, chap. 688, § 2) relative to the power of a corporation to borrow money and mortgage its property, apply to a railroad corporation and limit the amount of a mortgage, which it may legally give, to the amount of its capital stock or to two-thirds of the value of its corporate property, if that be greater than its capital stock.

The legality of a mortgage, not limited in its amount either to the capital stock or to two-thirds of the value of the corporate property, given to secure bonds to be used in taking up outstanding issues, and also to secure further bonds, which are only to be issued with the consent of the stockholders, considered.

APPEAL by the defendants, The Coney Island and Brooklyn Railroad Company and others, from an order of the Supreme Court,

made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 26th day of June, 1897, granting an injunction *pendente lite*.

*William N. Dykman*, for the appellants.

*Almet F. Jenks* [*William E. C. Mayer* with him on the brief],  
for the respondent.

CULLEN, J. :

The plaintiff is one of the defendant's shareholders, and brings this suit to restrain the company from executing and delivering a trust mortgage to secure the issue of negotiable bonds to the amount of \$1,500,000. The capital stock of the defendant is \$1,000,000. The execution of the mortgage has been assented to by the owners of more than two-thirds of the capital stock. The circular sent by the defendant to its stockholders thus states the necessity or propriety of the issue of bonds, and the purposes to which these bonds are to be applied.

"The bonds will be held for the following purposes by the trustee :	
To retire outstanding bonds due in 1903.....	\$300,000
To retire outstanding certificates of indebtedness.....	400,000
There have been sold to pay for extensions and equip- ment.....	150,000
The trustee will hold subject to the order of directors.	150,000
The trustee will hold the balance.....	500,000
	<u>\$1,500,000."</u>

The plaintiff attacks the execution of this mortgage as unnecessary and wasteful, and also as in contravention of the statute. The Special Term upheld both these claims, and granted the injunction sought.

A great part of the assault upon the propriety of executing this mortgage proceeds from what we conceive to be a misconception of the legal effect of the execution and delivery of such an instrument. The mortgage itself does not constitute any debt or obligation of the company, but only creates a lien for the security of such bonds



as may thereafter be issued under it. A limit to the amount of bonds to be issued is prescribed by the mortgage. This is requisite, for otherwise no bondholder could know the extent or sufficiency of his security. But the provision for the amount of bonds that may be issued does not create a debt of the company to that extent. The provision for taking care of the \$700,000 of the mortgage bonds and certificates of indebtedness maturing July 1, 1903, if not actually necessary from a business point of view, was certainly wise and proper. When those obligations mature they will have either to be extended or paid off. If extended, then the mortgage which it is now proposed to issue will continue to be only a second lien. If paid off, the money will have to be raised by disposing of second mortgage bonds, a thing that it may be impracticable to do on favorable terms. The mode adopted by the defendant's directors is that usually taken in the case of consolidated mortgages by railroad corporations. At most, whether it was the better plan or not was a question to be decided by the directors and stockholders of the company, and with the exercise of their judgment, made in good faith, we cannot interfere. The provision does not increase the charges against the corporation a single dollar, either for principal or interest. The sum of \$150,000 for extension and equipment is not attacked. The propriety of borrowing this sum is conceded. There was at least a probability (a probability which has now been realized) of the extension of the defendant's railroad across the bridge, for which the second sum of \$150,000 was provided. As for the \$500,000, no plan whatever for its use has been formulated, but the issue was authorized in contemplation of possible future contingencies which might require borrowing that sum. The learned Special Term held that the provision for the issue of bonds for these two last amounts was unauthorized, as no present necessity existed for the use of the money.

We agree with the Special Term that the borrowing of large sums by the defendant, for which it had no immediate use, or the possibility of whose use was wholly speculative and contingent, would be wasteful and improper. But the whole assault from this point of view on the defendant's action proceeds on the erroneous theory that the execution of the mortgage itself constitutes a borrowing of money. The learned counsel for the respondent gravely

argues that the defendant would be obliged to pay the interest on the \$500,000 of bonds, unexecuted and in the hands of the trustee. Surely this notion is wholly fanciful. The mortgage guards the issue of this portion of the bonds by providing that they shall not be certified by the trustee except on the written request of two-thirds in amount of the stockholders. It will thus be seen that none of this money is to be borrowed unless the future requirements of the company demand it. Practically, the only effect of this provision for the subsequent issue of bonds is to enable the holders of such bonds, when issued, to share equally with the holders of the bonds now issued, in the security of the present mortgage, instead of relegating the purchasers of the new bonds to a second and subordinate lien. It is the same as if the present mortgage, instead of securing \$1,500,000 of bonds, should secure only \$1,000,000, and provide that any mortgage hereafter executed by the defendant to the amount of \$500,000 should share equally in the security of the defendant's road and property, and its lien be equal with, and not subordinate to, the lien of the present mortgage.

We think, however, that, on the papers now before us, a mortgage cannot be issued to the amount specified. We are of opinion that section 2 of the Stock Corporation Law (Chap. 564 of 1890, as amended by chap. 688 of 1892) applies to railroad corporations, and that a mortgage must be limited, either by the amount of the paid-up capital stock or by two-thirds of the value of the property of the corporation, if that be greater than the paid-up capital stock. The affidavits for the defendant show the value of the defendant's property, including franchises, to be about \$2,100,000, two-thirds of which amount would be less than that of the proposed mortgage. It is true that \$500,000 of the bonds are to be issued in the future, and it may be that, when issued, the capital stock of the corporation, or the value of its property, may have been so increased as to authorize a mortgage for even a greater amount than that now sought to be issued. But the difficulty is that the present mortgage authorizes the issue of bonds on the assent of two-thirds in amount of the stockholders, without reference to the amount of the capital stock of the company, or the value of its property, and we are not prepared to say that any provision in the mortgage limiting the subsequent issue of bonds could relieve the defendant from the statu-

tory limitation. We think that the amount of the mortgage cannot exceed two-thirds of the value of the property, or the amount of the capital stock, as they exist at the time of the execution of the mortgage. It is stated on the argument that the real value of the defendant's property is far more than sufficient to justify the amount of the mortgage. If this be the fact, it may be proved on the trial. But on the papers before the Special Term the order was justified.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

NASON ICE MACHINE COMPANY, Appellant, v. SARAH B. UPHAM and  
THE YONKERS HYGEIA ICE COMPANY, Respondents, Impleaded  
with WILLIAM L. HEERMANCE.

*Mechanics' liens—when an ice-making plant may be made the subject of a lien.*

An ice-making plant is not, in terms, embraced within the statute relative to mechanics' liens (Laws of 1885, chap. 342, as amended by Laws of 1895, chap. 673); but where the court, upon the trial of an action brought to foreclose a lien filed to secure payment for such a plant, finds that the work and materials in question "were used in the erection and construction of said plant upon the aforesaid premises and in the erection and alteration of the buildings upon said premises," and it further appears from the evidence that the plant was annexed to the freehold by masonry in such a manner that the building would have to be taken to pieces to remove it, the lien may be sustained, and a dismissal of the complaint is improper.

APPEAL by the plaintiff, the Nason Ice Machine Company, from a judgment of the Supreme Court, in favor of the defendants Sarah B. Upham and the Yonkers Hygeia Ice Company, entered in the office of the clerk of the county of Westchester on the 14th day of December, 1896, upon the decision of the court rendered after a trial at the Westchester Special Term dismissing the complaint on the merits as against the defendants Sarah B. Upham and the Yonkers Hygeia Ice Company, except from so much thereof as adjudges that the plaintiff recover of the defendant Heermance the sum of \$17,900.52.

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SECOND DEPARTMENT, MARCH TERM, 1898.

*Charles De Hart Brower*, for the appellant.

*Joseph F. Daly*, for the respondents.

WILLARD BARTLETT, J. :

This is an action to foreclose a mechanic's lien claimed by the plaintiff for furnishing and placing upon the premises of the defendant Upham, in the city of Yonkers, a certain ice-making apparatus of a specified patent. The contract for installing the apparatus was made with the defendant Heermance, who, at the time, was the lessee of the premises. Before the machinery was completely installed the defendant Heermance assigned his lease to the Yonkers Hygeia Ice Company. The trial court rendered judgment in favor of the plaintiff against the defendant Heermance personally for the value of the ice-making apparatus, but held that the notice of lien was insufficient, and dismissed the complaint on the merits as against the defendants Upham and the Yonkers Hygeia Ice Company. The record indicates that the lien was deemed insufficient upon the ground that the statute did not authorize a mechanic's lien for ice-making machines. The Mechanics' Lien Law in force at the time the action was commenced and at the time of the trial was chapter 342 of the Laws of 1885, as amended by chapter 673 of the Laws of 1895. Under the 1st section of that statute a lien might be acquired by one who performed any labor or service or furnished any materials used or to be used in erecting, altering or repairing any house, wharf, pier, bulkhead, vault, bridge, building or appurtenances to any house, building or building lot, or who should dredge, fill in, grade or otherwise alter or improve land under water, meadow, marsh, swamp or other low lands, or who should perform any labor or services, or furnish any materials used in improving or equipping any house, building or appurtenances with any chandeliers, brackets or other fixtures or apparatus for supplying gas or electric light, with the consent of the owner. Under ordinary circumstances the language used in this section would not embrace the furnishing of an ice-making apparatus; and if nothing appeared in the case beyond the fact that such an ice-making apparatus as is described in the contract between the plaintiff and the defendant Heermance was placed upon the land of the defendant Upham, I should think the ruling of the trial court was clearly correct.

But something more does appear. The learned trial judge expressly finds, in his formal decision, after reciting the making of the contract for the erection of an ice-making plant upon the premises described in the complaint, that the plaintiff duly performed such contract, and that the work and materials required by said contract "were used in the erection and construction of said plant upon the aforesaid premises and in the erection and alteration of the buildings upon said premises."

Here, then, we have it distinctly decided, as matter of fact, that the labor performed and the materials furnished pursuant to the contract for putting up the ice plant were actually used in erecting and altering buildings upon the land. This finding brings the work and materials directly within the scope and purview of the statute, and if there was any evidence to sustain such finding it followed that the plaintiff was entitled to a lien.

I think there is enough evidence in the record to support the finding. One witness testified that the machine was masoned into the ground, and was so fastened to the building that the building would have to be taken to pieces in order to remove the tanks. This testimony, though meagre, warranted a conclusion like that which was reached in regard to a similar annexation to the freehold in *Watts-Campbell Co. v. Yuengling* (125 N. Y. 1), that the plaintiff performed labor and furnished materials in altering or repairing a building for which a lien could be acquired under the statute.

The learned trial judge did not pass upon the question whether the work was done and the materials were furnished with the consent of the owner, evidently because he deemed this question immaterial in view of his decision that there could be no lien for an ice plant. The proof on this subject was conflicting, and it is not necessary that we should express any opinion in regard to its weight, as more testimony upon this branch of the case may be offered on a new trial. It is enough, for the purposes of the present appeal, to say that the evidence on the first trial would have warranted, though it did not require, a finding that such consent was given.

These views require a reversal of the judgment so far as appealed from.

CULLEN and HATCH, JJ., concurred; WOODWARD, J., not sitting.

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SECOND DEPARTMENT, MARCH TERM, 1898.

GOODRICH, P. J. :

The action is for the foreclosure of a mechanic's lien. The defendant Sarah B. Upham was the owner of certain premises on Woodworth avenue, in the city of Yonkers, on which there was a three-story building. She leased the premises to the defendant Heermance by a written lease for one year from May 1, 1894. This lease gave to Heermance the option, during the term of the lease, to purchase the premises for \$8,500, and he covenanted not to "assign this lease, nor let or underlet the whole or any part of the said premises, save only to any Ice Manufacturing Company or corporation to whom he shall choose to assign or underlet." Heermance went into possession of the premises and made a contract with the plaintiff for the construction of ice-making apparatus, and, upon the completion of the work under the contract, the plaintiff, on October 4, 1894, filed a mechanic's lien against the property for the contract price and extra work amounting to about \$19,000, less certain payments made thereon.

The answer of the ice company alleges that, on June eighteenth, Heermance entered into a written contract with it, in which it was recited that he had partly erected and then owned "a certain plant, buildings, fixtures and appurtenances," and that the company had agreed to purchase "said plant and its appurtenances (excepting, however, the certain three-story building erected on said premises), as the same is now partially completed," and thereupon it was agreed that Heermance, in consideration of \$65,000 stock of the company and \$25,000 in cash, should complete the said ice manufacturing plant and its appurtenances which were sold and delivered to the company by a bill of sale of even date with the agreement. The contract under which the work was done consists of a letter addressed to W. L. Heermance and signed "Nason Ice Machine Co.," in which the latter proposed "to furnish, and erect, deliver, start and turn over in running order" a specified ice-making apparatus "on your premises at Yonkers," guaranteed to have a capacity of twenty-five tons of ice per day. The plaintiff was to furnish the apparatus, consisting of two machines, each with a steam engine, a full set of anchor plates and foundation bolts for each machine, four ice tanks, condensers, cranes, tackle and small tools, all of the above being elaborately specified; also two foundations, for which

Heermance was to furnish the excavating. The buildings, some carpenter work and some of the connections, not included in the estimate, were to be, and were, erected and furnished by Heermance.

The court found, among other things, that "the plaintiff duly performed the contract on its part, and, in addition, at the request of the defendant Heermance, performed certain extra work and furnished certain extra material, all of which work and material and the work and materials required by said contract were used in the erection and construction of said plant upon the aforesaid premises, and in the erection and alteration of the buildings upon said premises," and directed a judgment in favor of the plaintiff against the defendant Heermance for the amount found due, but dismissed the complaint as against the defendants Sarah B. Upham and the Yonkers Hygeia Ice Company, and directed a cancellation of the lien. From that part of the judgment, entered upon this decision, which dismisses the complaint as against the defendants Upham and the company and directs a cancellation of the lien, the plaintiff appeals.

It becomes necessary to consider certain rulings which do not appear in the decision as signed by the justice. When the mechanic's lien filed in the office of the city clerk was offered in evidence by the plaintiff, objection was made upon the ground that the statute does not authorize a mechanic's lien for ice-making machines, and that there is nothing in the lien which shows any contract between the defendant Upham and the defendant Heermance. The objection was sustained and the lien was excluded under the plaintiff's exception. This brings us to the consideration of the question whether the statute authorizes a lien for ice-making machines. The statute (Chap. 342 of the Laws of 1885, as amended by chap. 673 of the Laws of 1895 [3 R. S. (9th ed.) 2635]) creates a lien in favor of any person furnishing labor or materials used in erecting, altering or repairing any house, building, or appurtenances of any house, with the consent of the owner, whether owner in fee or of less estate, or whether a lessee for a term of years upon such house, building or appurtenances, and upon the lot upon which the same stand.

It will be observed that several things are essential to the creation of a lien: *First*, the work or materials must be used in the erecting, altering or repairing of the building or appurtenances.

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*Second*, they must be furnished with the consent of the owner as above defined. *Third*, such owner must be the owner of the fee, or of a less estate, or a lessee for a term of years.

The underlying principle of the statute by which a lien is authorized is the fact that the service and property of the lienor have, with the consent of the owner, entered into and become a component part of the owner's property, and that justice requires that compensation be made therefor out of the property benefited. It is absolutely essential that the work should have been done with the consent of the owner, whereupon his consent operates as an estoppel upon the owner to deny the benefit conferred upon his property.

In the case of *The Watts-Campbell Co. v. Yuengling* (125 N. Y. 1) the court held that the plaintiff was entitled to a lien for the erection of a gas compressor, engine, two oil traps and foundation plates on certain premises owned by the defendant. In that case the contract was made directly with the owner of the premises, so that his consent was not in question, but the court held that the labor performed and materials furnished were for the purpose of making a permanent accession to the realty, saying: "The articles furnished by the plaintiff were, in fact and in intention, annexed to the freehold so as to become a part of it, and would, as between vendor and vendee, pass by deed of the premises without special enumeration. Hence, the plaintiff performed labor and furnished materials used in altering or repairing a building, or appurtenances thereto, for which he could have acquired a lien under the statute."

I can see no essential difference between the character of the work done by the plaintiff in the case just cited and the character of the work done by the plaintiff in this case, as impressing upon the result of the labor and materials the character of fixtures. The testimony upon that subject reads: "I am a mechanical engineer, and was employed by the plaintiff in putting up the ice plant for Col. Heermance at Yonkers. The compressor engines had anchor plates about a foot under the ground. There were built brick foundations for them. A bolt comes up through the foundation and through the anchor plates. The bolts cannot be removed without taking down the brick foundation. The brick foundation comes about twenty-six inches above the ground; is two feet wide by



from fifteen to eighteen feet long. There are two of these foundations. The engines are fastened to the brick work by nuts on the bolts. There are ten bolts to each foundation. It is necessary that the engines should have these foundations. The foundations were built first and the building was built around it. The building in which the ice tanks are adjoins the building in which the engines are — that is, they are different rooms. The tanks are about twenty feet in length and between four and five feet deep. The building was not completed when the tanks were put in; a foundation was first made for the tanks. The tanks were put in in sections. The building was enlarged to get the tanks in. The space between the walls and the tanks was left for insulation. The beams ran across from side to side across the top of the tanks. The Court: Q. How was this machine attached to the building? A. It was masoned into the ground. Mr. Haines: The ice tank arrangement was fastened to the building and the building would have to be taken to pieces to take the tanks out. You would have to remove everything to get it out. The floor timbers formed a part of the apparatus."

The first question to be considered is as to the character thus impressed on the articles which were furnished and set up by the plaintiff in the building already on the land, or which were erected by Heermance or the ice company. In the agreement between the plaintiff and Heermance it was provided that the plaintiff was to furnish and put in the foundations for the engine and compressor; that Heermance was to do the excavation and to furnish solid ground for them to stand upon, and was also to erect the buildings, tank insulation, carpenter work around the brine tank and all necessary water and steam connections for the plant. The evidence shows a very pronounced attachment of the machinery to the soil and the foundations; that a building was subsequently erected around it; that a foundation was first made for the tanks; that the building was enlarged to get them in, and, subsequently, more buildings erected around them, beams run from side to side of the building across the top of the tanks; that the machine was masoned into the ground; that the ice tank was so fastened into the building that the latter would have to be taken to pieces in order to take it out, and that a tall chimney was erected.

In the case of *Potter v. Cromwell* (40 N. Y. 287) a judgment creditor of the owner of certain premises had issued execution and the sheriff had sold the premises to the defendant Cromwell. The owner had previously erected upon the premises certain machinery, including what is known as "Noyes' Portable Grist-Mill." After the sheriff had made the sale the judgment debtor surrendered possession to the defendant, who, with the consent and permission of the judgment debtor, removed the machinery and grist mill and subsequently received the sheriff's deed of the premises. The plaintiff was thereafter appointed receiver in supplementary proceedings against the debtor and brought his action to recover the property which had been removed from the mill. The Court of Appeals held that the mill was a part of the realty, the title to which passed by the sheriff's deed. There was considerable review of the authorities upon the subject of fixtures, the court recognizing the distinction between property affixed to the building so that it could be easily detached, and machinery erected in such a way that it could not be removed "without injury to the building or any portion of it." The court adopted and approved the doctrine as to fixtures laid down in *Teaff v. Hewitt* (1 McCook [Ohio], 511), "that the true criterion of a fixture is the united application of three requisites: *First*. Actual annexation to the realty, or something appurtenant thereto. *Second*. Application to the use or purpose to which that part of the realty with which it is connected is appropriated. *Third*. The intention of the party making the annexation, to make a permanent accession to the freehold," and held: "Under all the authorities, therefore, in this State as well as elsewhere, this mill was a fixture. For it was annexed to the building erected upon the land, to be applied and appropriated to the business there to be carried on, with the design that it should be a permanent structure for use as a custom grist-mill for the neighborhood existing about it." This definition was again approved by the Court of Appeals in the case of *McRea v. Central Nat. Bank of Troy* (66 N. Y. 489), where the owner had erected machinery for a twine factory and subsequently sold the premises by conveyance, describing the land only, taking back a mortgage containing the same description, and, at the request of the grantee and after the execution of the deed, executed also a bill of sale of the machinery.

Great stress was laid upon the fact that, although most of the machines were complete in themselves and could be removed without material injury to themselves or the building, still there was sufficient evidence to show that the original intent of annexation was to make the machinery permanently a part of the freehold.

Following these three elements of the doctrine of fixtures, I think it appears by the evidence in the case at bar that there was, *First*, an actual annexation of the plaintiff's erections to the realty or something appurtenant thereto. *Second*, an application to the use or purpose to which the realty was appropriated. *Third*, that the intention of the parties making the annexation was to make a permanent annexation to the freehold. In regard to the last proposition, as to intention, I do not in this connection discuss the intention of Mrs. Upham as the owner, for her consent to the erection of the machinery by the plaintiff and to the changes of the buildings on the premises and the erection of new buildings is discussed later. The only parties defendant concerned in the annexation were Heermance, while he was in possession, and subsequently the ice company which took an assignment of the lease in accordance with the consent of Mrs. Upham in the original leases. There can scarcely be doubt that it was the intention of Heermance and the ice company, who made the erections and additions, that they should be permanently attached to the premises for the purposes of being used as structures for the business of the ice company, equivalent to the intention of the parties in *Potter v. Cromwell* (*supra*), that those buildings should be used as a permanent structure for the grist mill for the neighborhood, and in *McRea v. Central Nat. Bank* (*supra*), that the premises should be used as a twine factory; and this is emphasized by the fact that it was the original intention of Heermance to purchase the land of Mrs. Upham, as the lease contained an option to the effect that he could purchase it for \$8,500. So, it is true, I think, that under the authorities already cited, Mrs. Upham could have successfully maintained an action to prevent the removal of the machinery which had become a part of the realty and appurtenant thereto, inasmuch as it clearly appears that the same could not have been removed "without injury to the building or any portion of it." (*Potter v. Cromwell*, *supra*.)

The erections became fixtures within the principle of the *Watta-*

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*Campbell* case, above cited, and, therefore, it must be assumed that the statute gave a lien upon the property for the work and materials furnished by the plaintiff, provided the consent of the owner was given to the erection. In examining this latter question we resort to the two leases by Mrs. Upham to Heermance. The first lease provided that Heermance would not assign his lease, nor let or underlet the whole or any part of the premises, "except to Ice Manufacturing Co.;" and the second and more formally drawn paper provided that Heermance would not "assign this lease, nor let or underlet the whole or any part of the said premises, save only to any Ice Manufacturing Company or corporation to whom he shall choose to assign or underlet."

There is uncontradicted evidence that Mrs. Upham admitted that the property was in the hands of one Richardson, a real estate broker at Yonkers, for the purpose of renting or selling, and that he told her that he had seen Heermance; "that he had made an offer to rent the property for the purpose of erecting an ice machine or plant," and "that his offer being satisfactory, she had directed Mr. Richardson to draw up a lease and accept Col. Heermance's offer;" that the first lease was drawn and signed by both of them, and subsequently the second lease was drawn and executed. She also admitted that she knew about the erection of the plant from what was told her about it by Richardson and by her son, and that she had been down in the neighborhood of the property, and had seen the buildings going up, especially the chimney, which she could see at a considerable distance. The son afterward testified that he did not know of any machinery being put in there, and did not go on the premises, but might have seen them from the railroad train, and had told his mother nothing about it. But there is no contradiction of the information given her by Richardson and her admission that she had seen the buildings and the chimney going up. She was not called as a witness to deny either of those facts or to show that she did not know of the performance of some work on the premises; and it may be assumed that, if it was possible for her to deny, she would have been called as a witness.

There have been various decisions of the courts as to what constitutes consent in cases to enforce mechanics' liens. Some of them arose on leases, where the covenant was that the lessee might or

should erect buildings which, at the termination of the lease, were to become the property of the lessor, or where express consent to the erection was given in the lease. (*Mosher v. Lewis*, 14 App. Div. 565; *Burkitt v. Harper et al.*, 79 N. Y. 273; *Otis v. Dodd*, 90 id. 336.) But there is no such explicit provision in the present lease, other than what has already been stated.

In *Havens v. The West Side E. L. & P. Co. et al.* (49 N. Y. St. Repr. 771), at General Term, where the lease contained no provision giving the tenant the right to construct buildings, it was said: "It does not seem to us that it could possibly have been the intention of the Legislature to make the owner of land which he has leased for a long term of years liable for improvements made upon this land for purposes of trade by his tenant. The mere fact that he may know that the tenant contemplates making certain improvements, or applying the property to certain purposes, certainly cannot make the owner liable for the moneys expended by his tenant in the doing of such work. It seems to us that the clear intent of the statute was to prevent the owner of real estate from permitting improvements to be made upon his property from which he is to derive an ultimate benefit, and which, without his consent or acquiescence, could not be made without incurring some obligation to those who have supplied labor and materials for the making of such improvements. But in those cases where the owner has no power to prevent the tenant from making such improvements as he sees fit, and from which the owner can derive no ultimate benefit, it never could have been the intention of the Legislature to make such owner liable, and it is doubtful if they had attempted to do so whether it lies within their power." This case is distinguishable from the present by the fact that here the lease gave an implied consent to an assignment to any ice manufacturing company, and it requires no violent presumption to enable us to decide that the owner knew that the buildings already on the premises were not adapted, without large and important alterations and additions, to the manufacture of ice, and that the lease was taken with that intention and for that purpose.

In *Cowen et al. v. Paddock* (137 N. Y. 188, 193) the court said: "While it is doubtless true that the consent required by the lien law need not be expressly given, but may be implied from the con-

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duct and attitude of the owner with respect to the improvements which are in process of construction upon his premises, still the facts from which the inference of a consent is to be drawn, must be such as to indicate at least a willingness on the part of the owner to have the improvements made, or an acquiescence in the means adopted for that purpose, with knowledge of the object for which they are employed."

It has been frequently held that consent implies a degree of superiority, at least the power of preventing, but it may be said here that the lease was made, to the knowledge of the owner, for the purpose of an ice manufacturing company; that the lease contained an option of purchase, and that she could not have prevented the erection of the plant and buildings in question, as she had given the lessee the right to assign to any ice manufacturing company. Her consent may, therefore, be implied to the erecting of a plant and buildings such as might generally be supposed to be useful or necessary to the operation of an ice manufacturing company. The evidence shows that she knew that the work was going on and did not dissent; that she stood by and permitted the work to proceed.

In his decision the learned justice finds that Heermance, the lessee, made a contract with the plaintiff for the work and materials in question, and that "the work and materials required by said contract were used in the erection and construction of said plant upon the aforesaid premises and in the erection and alteration of the buildings upon said premises," and that Heermance, before the completion of the work, "with the consent of the defendant Upham, assigned his said lease to the defendant the Yonkers Hygeia Company, who forthwith entered into possession of said leased premises and were still in possession at the time of the trial hereof" (December, 1896). There was ample evidence to justify this finding.

In *Husted v. Mathes et al.* (77 N. Y. 388), a case to enforce a mechanic's lien, the court said that the owner "was informed of the intended improvement and knew of the work while it was in progress. She received the benefit willingly." In that case there does not appear to have been any written lease, either by the report of the case or the record on appeal.

In *Nellis v. Bellinger* (6 Hun, 560) the son of the owner of the fee erected on the premises a house for his own use, and the owner

was present on several occasions and rendered some assistance in the erection of the house; he resided in the neighborhood and made no objection to the work being done. The court held that such facts constituted consent.

We think that the evidence in this action is sufficient to justify the belief that Mrs. Upham consented to the erection of the plant and buildings. This court had occasion, in the case of *Massachusetts Nat. Bank v. Shinn* (18 App. Div. 276) to consider the question whether the placing of certain machinery or other appliances by a tenant upon leased premises did not make the property so affixed a part of the freehold, and held that the property remained personalty to such an extent that the tenant had the right to remove it; but in that case the lease contained a covenant that the tenant should have the right to remove within sixty days after the termination of the lease. This opinion is not in conflict with the principle involved in this action.

The lessee, Heermance, assigned his lease, as he was authorized to do, and sold his interest in the premises to the Hygeia Company, and the company or Heermance completed the plant, and at the time of the trial the company was in possession.

It is perfectly clear that, as to certain parts of the work, that is, the chimney and the buildings erected upon the land, neither the lessee nor his assignee, nor any tenant, would have the right of removal, and there is evidence showing that certain parts of the machinery cannot be removed without a destruction of the buildings. It may be that the rights of the parties are clearer as to the permanent character of some parts of the erections than they were as to others, but with this difference the plaintiff has nothing to do. It has shown the consent of the owner of the fee to the erections, and the consent of the Hygeia Company may be implied from the fact that the contract of the plaintiff with Heermance was assigned to the company before its completion, that the work was subsequently completed, and that the company is in possession. As between the plaintiff and either Mrs. Upham or the company it is equitable that the plaintiff should have his lien upon the whole property, all the more that the estimated value of the land is shown by the lease, which gave Heermance the option of purchase at \$8,500, and the value of the work and materials furnished by the plaintiff

is nearly two and one-half times as great. It may be that as between the owner and the company, there are some equities as to the proportion in which the parties ought to bear the burden of the plaintiff's lien, but we cannot in this action consider that question.

The statute gives the materialman a lien where the work and materials have been furnished either upon the consent of the owner of the fee or the owner of the less estate, or of a lessee. It is silent as to any distribution of the burden of the lien. The lien covers the land and all fixtures thereon which are so affixed to the freehold as to become a part thereof or appurtenant thereto. The statute, when defining the lien, uses the words land, building or appurtenances to the extent of the right, title and interest of the owner or lessee. It is evident that the statute was intended to create a lien upon all such different estates as are involved in this action, whether of Mrs. Upham, the owner, or of the company, as lessee or assignee of the lease in possession, upon the land, building or appurtenances. The work and materials furnished by the plaintiff come within the category of one or the other of these words. The plaintiff's work and materials have become a part of the realty and are in possession of the company, and it is only equitable that the plaintiff should not be deprived of its property without such security as may be derived from the maintenance of its lien. All the requirements of the statute have been complied with, and it was reversible error for the court to exclude the notice of lien filed in the county clerk's office.

The plaintiff is entitled to have and enforce its lien, and it follows that so much of the judgment as directs a dismissal of the complaint as to the defendants Upham and the Hygeia Ice Company and directs a cancellation of the lien must be reversed and a new trial granted.

Judgment reversed and new trial granted, costs to abide the event.



THOMAS F. QUIGLEY, as Administrator, etc., of JAMES QUIGLEY, Deceased, Respondent, v. THE H. W. JOHNS MANUFACTURING COMPANY and THE PHENIX CHEMICAL WORKS, Appellants.

*Negligence — alterations in a building made by a tenant — liability of the tenant making them and of the owner of the building to another tenant injured by the fall of the building — expert testimony.*

A manufacturing company, upon hiring the upper part of a building, some forty feet high, divided into two portions by a floor constituting the ceiling of the basement, put up a second floor, to furnish support for the beams of which it cut a series of holes four inches deep in pilasters sixteen inches thick forming part of the walls above the first story, thus leaving the pilasters at such points of the same thickness as the neighboring walls, viz., twelve inches; and upon the termination of its tenancy, in accordance with the terms of its lease, the manufacturing company removed the floor and beams and left the holes in the pilasters unfilled.

*Held*, that it could not be said to have created, by its act, an intrinsically dangerous nuisance, rendering it liable for the death of the tenant of the basement of the building, occasioned some time after the manufacturing company's removal by the collapse of the building during a heavy wind; that its liability, if any, arose out of its violation of its obligation as tenant not to alter the condition of that part of the premises which it occupied so as to injure other tenants in the same building;

That it was the duty of the owner of the building, upon regaining possession of the premises vacated by the manufacturing company, to use reasonable diligence to prevent the continuance of any condition created therein by the former tenant which there was reasonable cause to believe might occasion danger to the tenant who continued to occupy the other part of the premises;

That a jury might find that greater diligence was required of the landlord in ascertaining whether the premises were in a safe condition than would be demanded of the tenant—so that it would not follow that the tenant was guilty of contributory negligence in not appreciating a danger, for a neglect to ascertain which the owner would be guilty of negligence;

That upon the trial of an action brought by the administrator of the deceased tenant, to recover damages resulting from his death, an expert witness should be permitted to answer the question, "Now state what in your opinion was the cause of the falling of that building," and the further question, "Well, how in your opinion, did the force of the storm affect the building so as to cause it to fall—in what way."

APPEAL by the defendants, The H. W. Johns Manufacturing Company and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county

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of Kings on the 25th day of January, 1897, upon the verdict of a jury for \$4,000, and also from an order entered in said clerk's office on the 26th day of January, 1897, denying the defendants' motion for a new trial made upon the minutes.

*William A. Jenner*, for the H. W. Johns Manufacturing Company, appellant.

*George W. Wingate*, for the Phenix Chemical Works, appellant.

*Charles J. Patterson*, for the respondent.

WILLARD BARTLETT, J. :

On the morning of the 8th day of February, 1896, a brick building belonging to the Phenix Chemical Works and situated on Thirty-ninth street near Second avenue, in the city of Brooklyn, was blown down in a violent storm and collapsed, causing the death of James Quigley, a cooper, who was a tenant on the ground floor. This action was brought by his administrator to recover damages for wrongfully causing his death against the Phenix Chemical Works, from which he rented the lower portion of the building, and also against the H. W. Johns Manufacturing Company, which had been a tenant of the upper part of the structure, and had made a series of cuttings or holes in the wall of the building, to the weakening effect of which its collapse was attributed. The plaintiff has recovered a verdict of \$4,000 against both defendants, and both defendants have appealed.

The case presents some interesting questions of law, and it will be necessary for us to consider: (1) The alleged negligence of the H. W. Johns Manufacturing Company, the tenant creating the condition which is said to have caused the accident, but whose tenancy had ceased before the accident occurred; (2) the alleged negligence of the Phenix Chemical Works, the landlord of the plaintiff's intestate, by whose action or non-action the condition created by the H. W. Johns Manufacturing Company was allowed to continue after the termination of the tenancy of that corporation, and (3) the alleged contributory negligence of James Quigley, the tenant, who was killed.

The building was a brick structure, between one hundred and thirty and one hundred and forty feet in length, thirty feet wide,

and between thirty-five and forty feet high from the ground to the peak of the roof. It was constructed in 1877 by the Phenix Chemical Works for the manufacture of sulphuric acid. The walls were sixteen inches thick to the top of the first floor. Above that to the roof the thickness of the walls was twelve inches, but this upper portion of the wall was strengthened by a series of pilasters sixteen inches thick (that is to say, four inches thicker than the wall), which pilasters were thirteen feet apart. As these pilasters were two feet wide, the side walls of the building may correctly be described as sixteen inches thick for one-third of their height, and twelve inches thick for the remainder, except for the two feet occupied by each pilaster, where the thickness was sixteen inches. Each pilaster was so built as to constitute a part of the wall itself.

In 1891 the Phenix Chemical Works ceased to do business there and took out a lead chamber which occupied the upper portion, leaving the building divided into two parts by a floor which constituted the ceiling of the basement. In January, 1894, the plaintiff's intestate, James Quigley, hired the building from the Phenix Chemical Works for use as a cooperage, at a rent of fifteen dollars a month. His principal customer was the H. W. Johns Manufacturing Company, and in October, 1894, with his sanction, the Phenix Chemical Works rented to the H. W. Johns Manufacturing Company all of the building except the ground floor, at the rate of fifteen dollars a month. In the correspondence which constituted the contract it was stipulated that, inasmuch as the H. W. Johns Manufacturing Company would have to put in various ceilings fittings, partitions, double windows, etc., entirely at its own expense, it was understood that whatever it put into the building was its own property and could be removed when the premises were vacated.

The Johns Company went into possession under this contract of letting, and put up a second floor between the first floor and the roof. For this purpose it caused holes four inches deep to be cut in the pilasters to receive the ends of the beams or girders which were to support the floor. There were about twenty-one of these holes in all, and the size of each girder was six by ten inches. The Johns Company continued to occupy the upper part of the building and use this floor after its construction was completed, until the

autumn of 1895 when its tenancy terminated, and it removed the floor, including the beams or girders, the ends of which had been inserted in the series of holes already mentioned. These holes were left unfilled, and remained so up to the time when the building fell. No consent of the Brooklyn department of buildings to the alteration of the building by the removal of the beams or girders was ever obtained by the Phenix Chemical Works or the Johns Company. It does not appear that any officer or representative of the Phenix Chemical Works had actual knowledge that the cuttings had been made in the pilasters for the introduction of the beams, or that the holes had been left unfilled upon the removal of the girders, until after the Johns Company had moved out of the building. Subsequently to the removal, however, and in the early part of December, 1895, Mr. Edward M. Gridley, the secretary of the Phenix Chemical Works, visited the building and went upstairs with Quigley who called his attention to the holes in the wall, and said that he did not think the Phenix Chemical Works had left the wall looking very nice. Mr. Gridley told him he thought they had left the building in better condition, take it altogether, than when they found it, and nothing further was said between them on the subject. There is other evidence in the case that Quigley was present at the time of the removal of the beams, and the fair inference is that he must have been well aware of the fact that the holes had been left unfilled.

Although the evidence did not fix the precise moment at which the building fell, counsel agreed that it was about nine-twenty-five or nine-twenty-six A. M. A violent storm of wind and rain prevailed in the vicinity at the time. The records of the United States weather bureau in the city of New York showed that between nine-twenty and nine-twenty-five o'clock that morning the wind blew from the east at a velocity of fifty-two miles an hour, and that the extreme velocity for one minute was fifty-eight miles. The evidence of the local forecast official in charge of that bureau tended to show that similar conditions probably prevailed in that part of Brooklyn where this building stood. He said that a storm with wind of fifty-eight miles an hour was not a common occurrence in this locality, although such storms occurred every winter, and there are half a dozen storms every winter running from fifty to sixty

miles an hour, with gusty conditions accompanying them. In November, 1895, there were two storms of fifty miles an hour, and in December, 1895, the wind on two occasions attained a velocity of eighty miles an hour. These storms in November and December the building proved strong enough to resist. It was the contention of the plaintiff, however, that the side wall on the east had been so weakened by the row of holes left in the pilasters that it was not strong enough to withstand the force of the wind which struck it in the storm on the morning of February 6, 1896; that the entire building fell in consequence of the weakness of this wall, thus causing the death of Quigley, who was engaged in his work there at the time; that the Johns Company was liable for his death, because it had wrongfully created the condition which caused the wall to fall, and that the Phenix Chemical Works were also liable, because that corporation, being the landlord in control and possession of the upper part of the building where the holes were, had allowed them to remain unfilled.

From this statement of the facts it will be seen that the tenancy of the Johns Company ceased many weeks before the building fell. The theory upon which the learned counsel for the plaintiff would hold that corporation is that, by its act in cutting the holes, it created an intrinsically dangerous nuisance, imminently perilous to the lives of the other persons in the occupation of the building; and he cites those cases in which the creator of such a condition has been made to respond for injuries resulting therefrom, even after his control over that condition has ceased. (*Thomas v. Winchester*, 6 N. Y. 397; *Coughtry v. Globe Woolen Co.*, 56 id. 124; *Devlin v. Smith*, 89 id. 470.) But no such state of things existed here as was represented in those cases. In labeling a deadly poison as a harmless medicine there is an obvious danger to every person who may have occasion to use the poisonous drug thus labeled; so it is plain that the defective construction of a scaffold, intended for the use of workmen upon a lofty building, will be likely to imperil the lives of those who are called upon to make use of it. In this case, however, the cutting of the comparatively small holes in the pilasters, still leaving the pier at its thinnest point just as thick as the neighboring wall, cannot fairly be regarded as the creation of a condition of imminent danger which was at all obvious or readily apparent to

any one. Indeed, it may fairly be inferred that if the representatives of the Johns Company, at the time they left the holes in the building, had taken the expert advice of some of the very highly qualified witnesses who testified upon this trial, they would have been assured that the holes constituted no source of danger whatever.

So far as the Johns Company is concerned, the true ground of liability would seem to be an entirely different doctrine of law. Where the owner lets different parts of the same building to different tenants, each tenant has the right as against every other that such other tenant shall not injure him by any active interference with the part which such other tenant occupies. Thus, it is plain that the tenant of the second story has a right that the first story shall remain intact so far as may be necessary for the support of the premises demised to him, and also that the roof on the story above shall not be interfered with so as to permit his premises to be injured by the action of the elements. This right is in the nature of an easement. (See Washb. Ease. [4th ed.] 639-647; *Pierce v. Dyer*, 109 Mass. 374.) Out of this easement springs the obligation on the part of one tenant to exercise reasonable care not to alter the condition of that part of the premises which he occupies so as to injure other tenants in the same building. A failure in this respect constitutes actionable negligence. (*Eakin v. Brown*, 1 E. D. Smith, 36, 44.) Upon this doctrine the cause of action here asserted against the Johns Company is not for a violation of the easement, which would have accrued at the time the beams were removed from the holes and the holes were left unfilled, but rests upon the violation of the obligation arising out of the easement, which violation occasioned the death of the plaintiff's intestate. In this view, the cause of action, being for negligence, did not accrue until the killing of Quigley by the fall of the building.

It remains to inquire, in reference to this defendant, whether the trial judge was right in charging the jury that it was an unlawful thing to remove the floor from the building in November, 1895, without the consent of the building department of the city of Brooklyn. This instruction was given at the request of the plaintiff, the judge saying that he had not seen the Building Law, but that he assumed the proposition to be correct, and, therefore, charged it. It is sought to be sustained by reference to section 32 of chapter

481 of the Laws of 1894. But I do not think that the language of that section supports the proposition. The statute does provide that before "the erection, construction or alteration of any building, or part of any building," is commenced in the city of Brooklyn, the owner, or his agent or architect, shall submit to the commissioner of buildings a detailed statement in writing of the specifications and a full and complete copy of the plans of the proposed work. The only prohibition, however, in the section cited, against the commencement or continuance of work, without the approval of the commissioner of buildings and the issuance by him of a permit, is contained in the following sentence, which does not embrace alterations: "Such statement and copy of the plans shall be kept on file in the office of the commissioner of buildings, and the erection, construction, or any part thereof, shall not be commenced or proceeded with until said statements and plans have been so filed and approved by the commissioner of buildings and a permit issued by him therefor." The probability is that the word "alteration" was omitted by accident or inadvertence from this portion of the statute, but I think it quite clear that the section as it stands did not make it unlawful for the Johns Company to remove the floor without the consent of the building department. If so, the instruction to the jury on this subject was erroneous.

As to the liability of the Phenix Chemical Works, the responsibility of that corporation for the accident, if it is responsible at all, must arise out of its relation as landlord to Quigley as tenant. At the time of the accident by which Quigley lost his life, the upper portion of the building in which the holes had been cut had been restored to the Phenix Chemical Works, and was wholly within the custody of that company as landlord. The rule, therefore, would seem to apply which was laid down by VAN BRUNT, J., in *Bold v. O'Brien* (12 Daly, 160) in this language: "The landlord, as far as the tenant is concerned, where the tenant occupies but a small portion of the tenement, is bound to keep the parts of the tenement under his control in such a state of repair that the tenant may occupy his premises with safety." The rule has frequently been asserted in the law of landlord and tenant that a landlord who occupies the upper story of his building, leasing the lower story to a tenant, may not negligently derange the construction of the upper

story so as to injure the property of the tenant on the floor below. (*Glickauf v. Maurer*, 75 Ill. 289.) In *Priest v. Nichols* (116 Mass. 401) the plaintiffs were tenants on the lower floor of a building belonging to the defendants, who themselves occupied the floor above. It was alleged that the defendants had charge of a waste pipe leading through the lower floor and negligently permitted it to get out of repair so that the water damaged the plaintiffs. The court held that these questions were properly left to the jury, and sustained the verdict for the plaintiffs, saying: "The rule that a landlord is not bound to keep the premises of his tenant in repair, and therefore cannot be held responsible for negligence, if out of repair, has no application to the facts presented in this case." In *Toole v. Beckett* (67 Maine, 544) the plaintiff hired a store from the defendant, who retained possession, care and control of the upper part of the building. The tenant's goods in the store were injured by rain which came down between the roof and the chimney; and the landlord was held liable for negligence in the manner of maintaining the roof. Under such circumstances it was held that the landlord undertakes so to exercise his control of that portion of the premises remaining in his possession as to inflict no injury upon his tenants. Applying the doctrine of these decisions to the case at bar, there is no difficulty in holding that the Phenix Chemical Works owed to Quigley some degree of diligence in respect to the condition of the upper part of the building. Their obligation, as it seems to me, was to exercise the reasonable care of a prudent landlord on regaining possession of the upper part of the building, not to suffer the continuance of any condition there created by the former tenant which they knew occasioned, or had reasonable cause to believe would occasion, danger to Quigley. If they fulfilled this obligation, they should be exonerated. If they failed to fulfill it, then they should be held liable, unless relieved by the contributory negligence of Quigley himself.

This brings us to the third important question in the case. It is argued with great earnestness that it is illogical to condemn the Phenix Chemical Works for failing to discover that the holes in the wall were dangerous, and at the same time to acquit Quigley. Indeed, in the view taken by the trial judge, I do not see how a



verdict for the plaintiff could very well be upheld, for by the twenty-sixth and twenty-seventh instructions, given at the request of the Phenix Chemical Works, the jury were told that the standard by which they were to ascertain whether there was any negligence, either on the part of Quigley or the Phenix corporation, was what was apparent to a reasonable man upon ordinary inspection, thus assuming that only the same measure of diligence applied to the landlord as applied to the tenant. I am inclined to think that this assumption is incorrect. The reasonable care of a prudent landlord may well require a higher degree of actual diligence and circumspection than the reasonable care of a prudent tenant. Where the landlord makes or tolerates a change in the construction of that portion of the premises which remains under his control, I think he is bound to take precautions against endangering the life, limb or property of the remaining tenant. Precisely what prudence requires that he should do to this end may vary according to the circumstances of the case; and a jury might well find that he ought not to remove a permanent portion of the structure, or allow the same to be removed, without some advice or inquiry of persons skilled in building construction as to the effect of such removal on the stability of the edifice. A prudent tenant, on the other hand, occupying another part of the building, whose only information of the change was derived from ordinary observation, and who possessed no special knowledge of building, might be exonerated from any imputation of negligence on his part for not discerning or appreciating the danger or extent of the danger involved in the changed construction.

It seems to me entirely possible, therefore, for a jury to take a view of the evidence in this case which would render the landlord liable, and would relieve the tenant, who lost his life, from any charge of contributory negligence. In saying this, I do not mean that a jury ought to take that view, for the evidence is also quite capable of a view which would wholly exonerate both defendants. But that there was a question of fact to be determined by a jury as against the Phenix Chemical Works, as well as against the H. W. Johns Manufacturing Company, appears to be entirely clear.

There must be a new trial, however, not only by reason of the error already pointed out, in charging the jury that the removal of the floor without the consent of the building department of the city

of Brooklyn was unlawful, but also by reason of the exclusion of certain evidence which was offered in the course of the examination of Mr. George M. Olcott, the president of the Phenix Chemical Works, who was an expert witness in regard to building construction, and who superintended the erection of the building which collapsed. It was the evident purpose of counsel for the defendants to prove by this witness, among other things, that the line of holes had nothing to do with the break in the wall, and that the fall of the building was due to some other cause. To this end he was asked the following question: "Now, in view of the fact that the wall fell along the line of the break, as you have testified, and that this line of the break was a considerable distance below the line of the holes, what, in your opinion, had the holes to do with the break?" Objection was made, but before any ruling the witness answered: "Nothing." The record then goes on to say: "Mr. Patterson: That is an expert question. Mr. Wingate: I think the witness has qualified himself as an expert. The Court: I think that is something about which the jury can tell just as well as the witness. I think that is the very question for the jury. [Objection sustained. Both defendants except]."

The learned counsel argues that this question was actually answered, and the answer was not stricken out; and, perhaps, that is enough to avoid the exception, although the jury, if of the average intelligence, must have understood the ruling as excluding from their consideration the answer which had just been given. But the same argument will not apply to the exceptions taken to the exclusion of the next two questions, which the trial judge refused to allow on the ground that they were solely for the jury. The first of these questions was: "Q. Now state what, in your opinion, was the cause of the falling of that building?" The second was: "Q. Well, how, in your opinion, did the force of the storm affect the building so as to cause it to fall—in what way?" The testimony which these questions sought to elicit was admissible, notwithstanding the fact that it called for an opinion upon the question or one of the questions which the jury were to determine. (*Meyer v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 645; *Van Wycklen v. City of Brooklyn*, 118 id. 424; *Covert v. City of Brooklyn*, 6 App. Div. 73.) There was no suggestion that Mr. Olcott was not a thoroughly

competent expert, and, in the case first cited, the court said : "The witness, as an expert, and speaking upon a question of science, might very well be asked, in presence of a given effect, of what causes it either was or might be the resultant." The subject under consideration relating to the construction of buildings, and the mechanical action of external forces upon an edifice constructed in the particular manner, called for the application of scientific or skilled knowledge within the meaning of the rule laid down by Mr. Justice BRADLEY in *Schwander v. Birge* (46 Hun, 66, 70), where he declared that to warrant the admission of opinion evidence "the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and, therefore, cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it." And in that case the same learned judge upheld the exclusion of the opinion evidence offered on the trial upon the express ground that the inquiry "involved no question of architecture as such, no combination of forces or strength of structural support requiring scientific or mechanical deduction." Here, on the other hand, the inquiry with which the jury were most concerned did involve precisely such questions, and the exclusion of the opinion evidence was clearly erroneous.

The judgment should be reversed and new trial granted as to both defendants.

All concurred, except WOODWARD, J., not sitting.

Judgment and order reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JAMES  
VAN TASSEL, Appellant.

*Subornation of perjury — proof of acts and declarations of conspirators, out of each other's presence, is admissible — proof of attempts to induce others to swear falsely — cross-examination as to collateral matters.*

In order that evidence of the acts and declarations of one of two persons (both of whom have been indicted for the crime of subornation of perjury) in the absence of the other, should be competent against the latter, it must appear that the two persons acted from a common purpose and design to do the act constituting the offense.

Proof of attempts, upon the part of the accused, to induce other persons to testify falsely upon the trial of the same action, is admissible upon the questions of motive and intent.

A witness cannot be cross-examined upon collateral matters merely for the purpose of forming a basis for the impeachment of his statements by other witnesses.

APPEAL by the defendant, James Van Tassel, from a judgment of the County Court of Dutchess county, rendered on the 18th day of June, 1897, convicting the defendant of the crime of subornation of perjury, and adjudging that he be imprisoned in the State prison at Sing Sing for the term of four years.

*William H. Wood*, for the appellant.

*George Wood*, District Attorney, for the respondent.

HATCH, J. :

The indictment charged the defendant and one Jacob Rieck with the crime of subornation of perjury, in that they procured George Roehle to testify falsely in a certain action pending in the Supreme Court. The defendant Van Tassel demanded to be tried separately, and was so tried. The indictment charged the combination between the parties, and upon the trial proof was given tending to sustain its allegations. The evidence is abundantly sufficient to warrant the verdict which was rendered, and it only remains for us to determine whether any errors were committed upon the trial which were prejudicial to the defendant.

The People offered evidence, under the objection and exception of the defendant Van Tassel tending to show the several acts of the

defendants, and the acts and declarations of one in the absence of the other. It is conceded that such evidence is not proper, unless there be evidence sufficient to justify the conclusion that the persons charged acted from a common purpose and design to do the act constituting the offense. When the witness Roehle was called it is quite doubtful whether evidence of the combination between the two defendants had been given which was legally sufficient to establish the combination and authorize the reception of the evidence of the declarations of Rieck in the absence of Van Tassel. We may assume that the evidence was not so sufficient; but it was subsequently supplied by other evidence, and the testimony of the defendant and the letter written under his direction to Rieck was sufficient for that purpose. The error, if error it was, was, therefore, cured, and the question became one simply of order of proof and the defendant does not appear to have been prejudiced thereby. The combination having been established, Roehle's evidence, as well as that which followed upon this subject, became admissible. (*People v. Bassford*, 3 N. Y. Cr. Rep. 219; *People v. McKane*, 143 N. Y. 455.)

The evidence which was received of other attempts made to induce other persons to testify falsely upon the trial, became competent, in view of all the circumstances. Motive and intent were elements in the commission of the offense, and the evidence received bore directly upon these subjects. The testimony had relation to the same transaction; *i. e.*, to give testimony upon the trial. It had relation to the same purpose; *i. e.*, to establish that two persons were seen to pull the defendant out of the trench into which he claimed to have fallen; which fact furnished one of the issues upon the trial, and the testimony was material thereto. It was connected in point of time, as the efforts of the parties were practically continuous from the formation of the combination up to the time when the trial was had and Roehle was sworn. These facts answer the requirements which the law imposes, and made the testimony admissible. (*People v. Peckens*, 153 N. Y. 576; *People v. Zucker*, 20 App. Div. 363; *affd.*, 154 N. Y. 770.)

No error was committed in excluding the testimony of Mrs. Baker respecting the declarations claimed to have been made to her by the witness Hire. The evidence which this offer sought to con-

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tradict was drawn out upon cross-examination and related to a matter collateral to the subject under investigation. It is a familiar rule of evidence that a witness may not be examined respecting collateral questions for the purpose of forming a basis for the impeachment of such statements by the testimony of other witnesses.

This view also disposes of the refusal to receive the defendant's testimony as to conversation with Hire upon a matter quite similar; and we may add in this connection that the defendant testified fully respecting his relations with Hire, and covered every material element in the case, so far as Hire was connected with it. The testimony of Roehle was corroborated by direct evidence and by circumstances; it, therefore, became the duty of the court to submit it to the jury. (*People v. Evans*, 40 N. Y. 1.)

These are all the questions which are urged upon our attention, and as we find no error in them, the judgment of conviction should be affirmed.

All concurred.

Judgment of conviction affirmed.

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HANNAH FRANK and Others, as Trustees of HADASSAH LODGE, No. 8, U. O. T. S., of the City of New York, Appellants, v. DONATO Trozzo and Others, Respondents.

*A payment on a recorded mortgage to one who negotiated the loan, but is not shown to have had possession of the securities, is not protected.*

An illiterate foreigner, unable to speak the English language, who has made payments upon a bond and a recorded mortgage, which was a lien upon her premises, to an attorney who negotiated the loan, but is not shown to have been in possession of the securities at the time when such payments were made, and who gave her receipts whose form indicated that he was acting merely as attorney for the mortgagees, is not protected in making such payments, and the bond and mortgage may be enforced against her premises for the amount actually due and unpaid to the mortgagees.

APPEAL by the plaintiffs, Hannah Frank and others, as trustees of Hadassah Lodge, No. 8, U. O. T. S., of the city of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 31st

day of August, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term dismissing the complaint upon the merits, and adjudging that a bond and mortgage be delivered up and canceled, and that the latter be discharged of record.

*Leonard Bronner*, for the appellants.

*Francis L. Corrao*, for the respondents.

HATCH, J. :

This action was brought to foreclose a mortgage, and upon the trial these facts were developed: The defendant Orsalina Quattrocchi was the owner of the premises covered by the mortgage. Having domestic difficulty with her husband, she agreed to give him \$2,000, and he agreed to leave. In order to raise the money she applied, at the instance of Donato Tuozzo, her brother-in-law, to one Frank, and he promised to loan her \$2,000. Frank insisted, before making the loan, that she should deed the property to the other defendants herein, and this was done, her husband joining in the conveyance. The defendants Tuozzo executed the bond and mortgage, after the conveyance, for the sum of \$3,000, although, as the court found, only \$2,000 was, in fact, loaned. This bond and mortgage ran to the plaintiffs in this action. It bore date May 27, 1889, and was recorded October 30, 1889. Immediately thereafter the premises were redeeded by the parties to the defendant Quattrocchi and her husband. The defendants are ignorant, illiterate people, neither read nor write, speak the Italian language, which Frank was unable to speak, and all communications were had through the medium of an interpreter who is now dead. Frank gave directions to the defendant Quattrocchi to pay to him the money secured by the mortgage in such sums as she should have to pay with, and whenever she had it. In pursuance of this direction she paid to Frank, at various times, money in sums ranging from \$30 to \$350, until the principal sum of \$2,000 and interest was paid. For these payments she took receipts from Frank, some of which were signed "Herman Frank," "Herman Frank, Atty. for Mtgee.," and "Herman Frank, for Mtgee." The money loaned was not Frank's money, but was the money of the plaintiffs delivered to him for

the purpose of making the loan. Frank paid interest upon the mortgage to the plaintiffs, but failed to pay over any part of the principal sum, and subsequently absconded. The court found that but \$2,000 were loaned by Frank instead of \$3,000, and the evidence is sufficient to support that finding, and also the finding that Frank falsely represented that the mortgage was only for \$2,000. The court further found that during all the time when the afore-mentioned payments were made Frank was in possession of the bond and mortgage, and that while they were so in his possession the bond and mortgage were paid and satisfied. If this proposition of fact can be sustained, then the defendant Quattrocchi in making the payments to Frank would be protected therein, assuming that such payments were made in reliance upon such possession. (*Smith v. Kidd*, 68 N. Y. 130; *Crane v. Gruenewald*, 120 id. 274.)

The finding, however, is vigorously attacked as being without evidence sufficient for its support. We think the attack must be sustained. The only evidence in support of the finding is found in the testimony of Mrs. Quattrocchi, and is in these words: "When I brought this money to Mr. Frank I put the money there and he gave me a receipt. He took a paper and wrote down on this paper. He did write something on another paper. He had a big paper in his safe. On a big paper he had in his safe. He had a large paper in the safe and he would draw the receipt. I cannot describe any paper or papers that anything was written on other than these receipts." This testimony is insufficient to identify the paper which he took from the safe as the bond and mortgage. It may as well have been a paper upon which he kept a memorandum as the bond or the mortgage. There was nothing said, so far as appears, with respect to Frank's making any indorsement of payment upon the bond. The bond and mortgage were not produced to see if she could identify them as the papers which Frank took from his safe, and we are furnished with no description, either by comparison or otherwise, from which it might be inferred that the papers were the bond and mortgage in suit. In addition to this the witness does not say that she placed any reliance in making the payment upon the possession by Frank of any bond and mortgage. This fact, perhaps, might be inferred from her act in paying if it appeared



that when she paid the bond and mortgage were there, but of this fact there is no proof. We must bear in mind that the burden rests upon the party paying, when payment is made to a person other than the principal, to establish that the person to whom the payment is made is clothed with authority to receive it. And it is only where the bond and mortgage remain in the possession of the agent that the person is justified in making payment to him in the absence of other circumstances establishing such authority. The proof relied upon in this case does not meet the requirement.

The plaintiffs called a number of witnesses to establish that, in fact, the bond and mortgage were almost immediately delivered to the principal, and have remained in its custody since. This evidence is not conclusive, as the persons were all parties in interest, and the relation existing between Mrs. Frank, who it is claimed first had the custody of the bond and mortgage after their execution, and her son, who acted in loaning the money, might well raise a doubt in this respect. Besides, it is usual for the attorney to record the security before delivery, and this mortgage was not recorded until five months after its execution and within a month of the first payment of \$850 by the defendant Quattrocchi. It does not appear that any one beside Frank procured it to be recorded. This would authorize the inference that he had it for some time after its execution.

The facts of this case justify the court in imposing no very strict rule upon the defendant Quattrocchi in proving the authority she relies upon, in view of the conceded fact that the plaintiffs placed it within the power of Frank to defraud these ignorant and innocent people. But, while this is true, we cannot shut our eyes to the failure of legal proof in the present record to sustain this finding. Nor do we think that the judgment can be sustained upon the ground that the plaintiffs placed it within the power of the attorney to perpetrate a wrong. The principle that, as between two innocent parties, the one must suffer who invests another with authority which enables him to perpetrate the wrong, we think has no application. It is true that these defendants were ignorant, illiterate and innocent, and they undoubtedly relied upon Frank in what he said and did. But the bond and mortgage did not run to him; these instruments ran to the plaintiffs, and while the defendant Quattrocchi did not execute either, and was not a party thereto, yet after the prem-

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ises were redeeded to her, and before she made any payments, the mortgage was recorded and gave her constructive notice of its existence and terms by virtue of the recording acts. Against this notice ignorance and misrepresentation cannot avail, otherwise it would amount to a repeal of the acts and render practically worthless securities protected thereby. In addition to this there was notice given that he was or might be acting for another, as he signed some of the receipts as attorney for the mortgagee.

For these reasons the judgment must be reversed and a new trial granted, with costs to abide the final award of costs.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

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JOHN MEENAGH, Appellant, v. JOHN BUCKMASTER, Respondent.

*Negligence — a vehicle upset by rubbish negligently placed in a street — duty of one, driving by invitation with another, to remonstrate against his reckless driving — misuse of a municipal consent to the placing of building materials in a street.*

On the trial of an action brought to recover damages for personal injuries caused by the alleged negligence of the defendant in obstructing a city street by rubbish, it appeared that a vehicle, in which the plaintiff was being driven by invitation, by one Kernahan, came in contact with the rubbish and upset, injuring the plaintiff. The court charged that "if Kernahan was intoxicated or his manner of driving was so heedless or careless as that Meenagh (the plaintiff), in the exercise of ordinary care, would have perceived it and failed to do so and to remonstrate with Kernahan, he (the plaintiff) was chargeable with contributory negligence for continuing to ride with him."

*Held*, that the charge was correct

A consent given by a municipal corporation to the placing of building materials in a public street does not relieve the licensee from liability to one who has suffered injury from the improper manner in which the licensee has used the consent.

APPEAL by the plaintiff, John Meenagh, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Orange on the 16th day of November, 1896, upon the verdict of a jury of no cause of action, with notice of an intention to bring up for review upon such appeal an order denying the plaintiff's motion for a new trial made upon the minutes.

*Jonathan Deyo*, for the appellant.

*A. H. F. Seeger*, for the respondent.

HATCH, J. :

This action was brought to recover damages for an injury sustained by the plaintiff on account of the negligence of the defendant in causing to be placed in the streets of the city of Newburgh a quantity of refuse matter consisting of earth taken from an excavation and rubbish from a building.

There was a considerable quantity of this material. It was placed in the street and permitted to remain over night, and no light or other signal was placed upon it to indicate its presence in the street. The plaintiff was invited to ride with one Kernahan, and as they were driving through the street the vehicle in which they were riding came in contact with the pile of rubbish, and the plaintiff was thrown out and sustained injuries for which a recovery is sought.

The evidence given upon the trial tended to establish that the horse was being driven at a rapid rate of speed prior to and at the time when it came in contact with the obstruction. The evidence justified the jury in finding that the rate of speed and manner in which the horse was driven constituted negligence upon the part of the driver. There was also evidence which authorized the jury to find that, if the driver and the plaintiff had exercised care, they might have seen the obstruction, and there was abundance of room in the street to pass it without contact. The main questions which are presented for our consideration rest upon the refusal to charge as requested by the counsel for the plaintiff and also upon errors in rulings by the court upon the trial. The request which the court refused to charge is in these words: "I ask your honor to charge the jury that, if they find that the plaintiff in no wise contributed to the fast driving, they are not to consider such driving as bearing on the question of plaintiff's contributory negligence." The general rule is recognized that the negligence of the driver of the vehicle is not to be imputed to a passenger therein who at the time has no authority to direct his movements or control his actions. Such rule, however, is subject to the qualification that it is the duty of the passenger, where he has the opportunity to act, to learn of the danger and avoid it if practicable. (*Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290.) None of the cases upon this subject

assume to do more than lay down a general rule which may be modified by the circumstances of the particular case. (*Robinson v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 11; *Hoag v. N. Y. C. & H. R. R. Co.*, 111 id. 199.)

It follows that in the consideration of such questions each case must be disposed of upon its particular facts. Therefore, we must consider the evidence and the general charge of the court upon the subject. The evidence, as we have before observed, tended to establish that the horse was being driven at a rapid and reckless rate of speed and that care and attention would have discovered the obstruction and avoided it. Under these conditions the court charged: "If Kernahan was intoxicated or his manner of driving was so heedless or careless as that Meenagh, in the exercise of ordinary care, would have perceived it, and he failed to do so and to remonstrate with Kernahan, he was chargeable with contributory negligence for continuing to ride with him, because if it occurred to Meenagh's mind that the driving was dangerous and careless, and he assented to it, then he was a party to it. As to the plaintiff's own negligence, a passenger has no right, because some one else is driving, to omit some reasonable and prudent effort to see for himself the danger, if there was a danger, and to avoid it." We think this charge is correct as applied to the facts of this case. We must assume that, in the exercise of reasonable care and prudence, the plaintiff could have observed the obstruction. Under such circumstances he ought not to remain passive; the situation required upon his part some affirmative act, either of remonstrance to the driver or by way of attracting his attention to the obstruction; he could not remain inert and shelter himself under the claim that he had no control of the horse or the driver. The jury might well say that reasonable care on his part would have restrained the driver from going at a reckless rate of speed or have enabled him to avoid the obstruction. The request to charge leaves out these elements, and consequently no error was committed in refusing to charge it. On the contrary, we think the general charge fully covered this subject, and was all to which the plaintiff was entitled. We may assume that the permit which was issued by the city of Newburgh to Sager, authorizing him to place building material in the street, was no protection to the defendant and that it was improperly received as evi-

dence. Upon this subject counsel for the plaintiff made the following requests:

"I ask your Honor to charge that a consent given by a corporation, to place an obstruction in a public street, does not relieve the party, to whom the consent is given, from liability in an action against that party, when such action is based on the wrongful manner in which the act is done." "And I ask, in view of that, that the Court charge that the consent or permission of the corporation, introduced in evidence in this case, does not relieve the defendant from an action for negligence." The court charged both of these requests, and thereby eliminated from the consideration of the jury the permit which had been received in evidence. The jury was bound to treat it as constituting no defense to the action, in consequence of which this evidence became immaterial, and the ruling was cured by the charge.

The court permitted proof, under the objection of the plaintiff, that it was not the custom in the city of Newburgh to place lights upon obstructions which remained in the streets over night. This ruling would be clear error and could not be sustained were it not for the fact that the plaintiff opened the door to such inquiry by asking: "What is the custom as to putting lights in excavations?" to which the witness replied: "They are supposed to have a light on a place like that at night." The plaintiff seeks to avoid the force of this by the claim that his inquiry related to excavations and not to obstructions. Such is the form of this question, but the witness evidently understood that it related to this obstruction or one of a similar character. His answer applied to the obstruction alone, as there was no reference to any excavation constituting an obstruction to the highway, and we think it clearly related to obstructions of this character, and that the witness in giving his answer, and the jury in hearing it, must have so understood. The plaintiff, therefore, could not complain of testimony to rebut what his evidence tended to establish.

We find no reversible error in the case, nor any other question justifying further discussion.

The judgment and order should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

WILLIAM H. ALLEE and Others, as Executors and Trustees, etc., of  
JOSEPH B. ALLEE, Deceased, Appellants, v. JOHN T. SLANE and  
CECELIA I. SLANE, Respondents.

*Creditor's action to set aside a conveyance from a husband to his wife — presumption of fraud — failure of proof that the husband was insolvent and was indebted to the plaintiff when the conveyance was made.*

*Semble*, that a conveyance made by a husband to his wife is presumptively fraudulent as to the husband's creditors, but an action brought by a creditor of the husband to set it aside must fail where it is not shown that he was a creditor when the transfer was made or that the husband was then insolvent.

APPEAL by the plaintiffs, William H. Allee and others, as executors and trustees, etc., of Joseph B. Allee, deceased, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 11th day of February, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term dismissing the complaint.

*William H. Sage*, for the appellants.

*M. F. McGoldrick*, for the respondents.

WOODWARD, J.:

It will be conceded, as contended by the counsel in behalf of the plaintiffs, that a conveyance by a husband to his wife will always be carefully scrutinized, and that as to creditors it is open to the presumption of fraud, but in the case at bar the plaintiffs have failed to establish that they were creditors at the time the transfer was made, or that the defendant John T. Slane was insolvent at the time of the delivery of the deed to his wife. It is true that there is some conflict in the statements of the defendants in respect to some of the details, but these cannot avail to give the plaintiffs a cause of action in the absence of affirmative evidence to show that the transfer of the property was made after the indebtedness of the defendant and at a time when he was otherwise insolvent. The trial court, on a hearing of the evidence, decided that "at the time of the making, delivery and recording of said deed to Cecilia I. Slane the defendant John T. Slane was solvent and had sufficient property to meet all his obligations," and that "at the time he was not

indebted to the plaintiff," and a careful examination of the testimony affords no good grounds for disturbing this finding of fact or the conclusion of law based upon such finding. The plaintiffs having failed to establish a condition of facts which brings the defendants within the presumption which the plaintiffs' counsel urges, it is unnecessary to consider the authorities cited.

The judgment of the trial court is affirmed, with costs to the defendants.

All concurred.

Judgment affirmed, with costs.

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JOHN GARVEY, Respondent, v. NEW YORK AND CUBA MAIL STEAMSHIP COMPANY, Appellant.

*Negligence — injury to a stevedore from catching his hand in the rope of a steam winch.*

Injuries sustained by a stevedore, of several years experience in his occupation, from catching his hand in the sling or rope of a steam winch so that his hand was drawn into the pulley at the end of the crane and was crushed, considered by the court, under the evidence, not to have been caused through any neglect of his employer, but by the carelessness of a fellow-servant or by his own negligence.

APPEAL by the defendant, the New York and Cuba Mail Steamship Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 10th day of June, 1897, upon the verdict of a jury for \$2,500, and also from an order entered in said clerk's office on the 10th day of June, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Charles C. Nadal* [*Edward P. Mowton* with him on the brief], for the appellant.

*E. J. McCrossin*, for the respondent.

WOODWARD, J. :

The plaintiff in this action was a stevedore and had been in the employ of the defendant for seven months, and had been doing the

same kind of work for several years. On the 19th day of April, 1894, while engaged with others in hoisting bags of coffee from the hold of the steamship *Seneca* by means of a winch or hoisting engine, his hand became entangled in a rope used as a sling and it was drawn into the pulley at the end of the crane and so severely crushed that it became necessary to amputate two of his fingers. It was contended on behalf of the plaintiff that the accident was due to some neglect on the part of the defendant "in that its said crane and the apparatus thereto belonging were in a defective, insecure and dangerous condition, all of which, upon information and belief, was well known to the defendant, and in that it carelessly and negligently placed this plaintiff at a perilous and hazardous employment without informing him of such perils and hazards." On the trial the plaintiff testified that he had been in the employ of the defendant on the 19th day of April, 1894, and that "we were lifting coffee out from the ship by means of the tackle, taking the drafts that came up, lifting them right on the deck, and my business was to unhook the fall and take the coffee off, put it back to the hold, hand over hand, that way (indicating), and the moment I had my hands on, pulling it down that way; the engine started suddenly, and as the engine started I hollered to the engineer—it was about that distance—four or five feet, 'Come back, come back, you are taking my hand in,' and I saw the man myself trying all his endeavors to push the lever down and stop the machine. He could not stop it that time and I was suspended in the air hanging from the hatch, and my partner—all he had to do was to pull me off otherwise when my fingers went off, I would fall right through the hatch and smash myself to pieces."

It was proven by two witnesses for the defendant, and practically by one of the witnesses for the plaintiff, that the way to start the winch and keep it in motion was by pushing the lever down; that it could move by the force of the engine only in one direction, and this only upon the affirmative action of the engineer, and the plaintiff testifies that "I saw the man myself trying all his endeavors to push the lever down and stop the machine." There was some testimony introduced, under objections, tending to show that the machine had not been in perfect working order on the morning of the day



on which the accident occurred, but the facts stated were not sufficient to justify the conclusion that a piece of machinery which can be put in motion only by the affirmative action of the engineer could be so out of repair that it would, of its own motion, start up suddenly; that would be reversing the whole course of natural law, and is not to be credited except upon the most positive and direct evidence of specific instances of such perversity on the part of things inanimate. Machinery which is out of repair often refuses to move when the impulse is given, but the idea of its starting without the aid of the engineer is absurd, and especially when the plaintiff, who was shown to be familiar with the work, testifies that he saw the engineer doing the very thing that was necessary to do to put the winch in operation.

It is a principle too well settled to require any argument at this time that a person of mature years entering any employment accepts the risks incident to such employment, and that the employer is charged with no higher duty than to provide machinery and appliances suitable for the work and to keep them in a state of repair which shall not increase the hazards of such occupation. The plaintiff in the case at bar had been employed in the discharging and loading of vessels for a series of years. He knew the dangers incident to the work which he was called upon to perform, and it was his duty to exercise that care and prudence necessary to preserve himself from harm in the ordinary course of the work. As was said by Judge PARKER in delivering the opinion of the court in the case of *Dingley v. Star Knitting Co.* (134 N. Y. 552): "The machine was such as was in ordinary use, and for aught the evidence discloses, the best known; it was situated with reference to the shafting as were the other machines in that room, and in other mills; no special defect in its situation or construction was pointed out; no one pretended to be able to assign with certainty the cause of the transfer of the belt from the loose to the tight pulley, if it was in fact so transferred, but, because the machine started on this and three other occasions, it is insisted that the jury had a right to infer that there existed a defect of some kind which the defendant was negligent in not providing against, notwithstanding the precise defect was then and has since remained unknown.

"In other words, that the jury may find that the defendant failed

in the discharge of his duty towards his employee by omitting to provide against an alleged defect in a machine in ordinary use, which so far no one has been able to point out. A proposition which, if sustained, extends the liability of the master to his servant far beyond its present boundaries, and would be without reason to support it."

Almost equally strong is the language of the court, speaking through Judge RUGER, in the case of *Dobbins v. Brown* (119 N. Y. 188). This was a case of an accident in a mine, in which the allegations of the plaintiff were in many respects similar to those of the case at bar. The court say that the evidence is not sufficient to support the allegations of the complaint, and comment as follows: "There was no evidence but that apparatus and appliances, similar to the one in question, were generally in use in deep shafts for mining purposes in this country, and in some instances it appeared they were required to be used by the statutes of the states in which they were employed. No proof was given of any defect in the plan or structure of the machinery or appliances constituting the apparatus used in elevating and lowering the bucket in question, or that it was not well constructed of good materials in accordance with the plans generally followed in manufacturing similar apparatus."

In the case at bar the winch was such as is in ordinary use; there was no evidence that it was out of repair, but, on the contrary, the testimony of the plaintiff, as well as that of all the witnesses who in any manner touched upon this question, shows that the machine responded to the action of the engineer with reasonable promptness, and that the accident was due, not to any neglect on the part of the defendant, but to the carelessness of a fellow-servant, or to plaintiff's own negligence in not taking those precautions in handling a new rope which were necessary to prevent accidents.

For these reasons the judgment of the trial court is reversed and a new trial granted.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

ANTON NAVRATIL and ANNA NAVRATIL, Appellants, v. LEOPOLD BOHM, Respondent.

*Place of trial*—it will not be changed from Queens county to New York county for the convenience of witnesses — changed for the reason that the cause of action arose, and that both parties reside, in New York.

Where, on a motion to change the place of trial of an action from the county of Queens to the county of New York, made on the ground that the convenience of witnesses and the ends of justice will be promoted by the change, it appears from the defendant's affidavit that the cause of action arose in the city of New York, in which county both the plaintiff and defendant reside, the motion will be granted for the reasons last stated, although no demand for a change, as a matter of right, has been made under section 986 of the Code of Civil Procedure.

*Semble*, that the place of the trial of an action will not be changed from the county of Queens to that of New York upon the ground of the convenience of witnesses.

APPEAL by the plaintiffs, Anton Navratil and another, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 20th day of December, 1897, granting the defendant's motion to change the place of trial of the action from the county of Queens to the county of New York.

*Isaac Josephson*, for the appellants.

*Edward Kaufmann*, for the respondent.

WILLARD BARTLETT, J. :

The affidavit upon which the defendant moved to change the place of trial of this action shows that the motion was based solely upon the 3d subdivision of section 987 of the Code of Civil Procedure, which authorizes the court to grant such an application upon the ground that the convenience of witnesses and the ends of justice will be promoted by the change. There was no demand, under section 986, that the change should be made because Queens county was not the proper county, and, therefore, no question arises as to whether the defendant was entitled to have the action transferred to the county of New York as a matter of right.

So far as the convenience of witnesses is concerned it is well settled by a long series of adjudications in this department, beginning early in the present century, that the venue will not be changed from the county of Kings to the county of New York on this ground. As long ago as 1805 the old Supreme Court said: "The court house of the county of Kings is so contiguous to the city of New York that there is no hardship in carrying witnesses from one place to the other. There is hardly a county in the State, in which the witnesses who attend a trial, do not travel further than they will in the present suit." (*Mumford v. Cammann*, 3 Caines, 139.) The existing court house in Queens county is little, if any, further from New York county, and the same rule has long obtained in regard to applications to change the place of trial from that county to New York on the ground of the convenience of witnesses. (*Daley v. Hellman*, 16 N. Y. Supp. 689.)

If, therefore, the record before us on the present appeal contained nothing more than the evidence intended to convince us that it would be more convenient for the witnesses in the case to attend a trial in New York than a trial in Queens county, we should feel constrained to reverse the order appealed from. But there are certain facts set out in the moving papers, and not denied by the plaintiffs, which convince us that the ends of justice will be promoted by the change, and, hence, that we ought not to interfere with the order. It appears from the defendant's uncontradicted affidavit that the cause of action arose in the county of New York; that the defendant resides in that county, and has resided there for upwards of thirty-five years, and that at all the times mentioned in the complaint the plaintiffs were also residents of the county of New York. Under these circumstances, it is only just and proper that the controversy between these parties should be litigated and determined in the forum of the locality in which that controversy arose, and of which they are inhabitants, rather than in a neighboring judicial district, where the courts are too fully occupied to sanction the unnecessary importation of litigations from other parts of the State.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

CHARLES W. CARPENTER and WALTER CARPENTER, as Executors, etc., of ELIZA CARPENTER, Deceased, Respondents, v. THOMAS J. BONNER and Others, Defendants.

CHARLES W. CARPENTER, as Purchaser in Foreclosure, Appellant.

*Will*—an imperative power of sale, although discretionary as to the time and circumstances of its exercise by executors, passes to an administrator with the will annexed.

A testator by his will, referring to his executors, provided as follows: "I authorize and empower them, at their discretion, to sell and convert all my real estate, and I direct them to divide the net proceeds of both real and personal estate into three equal and separate portions or funds."

*Held*, that the words "at their discretion" related to the time at which, and the circumstances under which, a sale might be made, but were not intended to give any discretion as to whether or not a sale should be made;

That the direction to sell was mandatory, and that the power, not having been exercised by the executors, might be exercised by an administrator with the will annexed.

APPEAL by Charles W. Carpenter, as purchaser in foreclosure, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 27th day of November, 1897, confirming the report of a referee, and requiring the said appellant to complete his purchase of the premises sold under foreclosure in the action.

The 2d article contained in the will of Gilbert B. Hart, deceased, referred to in the opinion, is as follows:

"*Second*. I authorize and empower my executors, at their discretion, to convert into money my personal property, except such parts of it as are hereinafter bequeathed, and I authorize and empower them, at their discretion, to sell and convert all my real estate, and I direct them to divide the net proceeds of both real and personal estate into three equal and separate portions or funds, and to invest the same on good security, and to keep them as separate and distinct funds or portions, with power to collect and reinvest the same, from time to time, as may be expedient or necessary, and to hold and dispose of said three funds in trust as follows: " Then follow directions as to the disposition of the said three funds.

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*Charles H. Wells*, for the appellant.*Frost & Manser*, for the respondents.

WILLARD BARTLETT, J. :

The title to the premises which the appellant purchased on the foreclosure sale in this action depends upon the validity of a sale made by Coleridge A. Hart, as administrator with the will annexed, under a power of sale contained in the will of his father, Gilbert B. Hart, deceased. The rule in regard to the exercise of such a power by an administrator with the will annexed was recently considered and applied by this court in the case of *Clifford v. Morrell* (22 App. Div. 470). There is no objection or obstacle to its exercise by such an administrator where no element of personal discretion is involved, and the power of sale is imperative under a fair construction of the will. In the present case it is not necessary to review at length the various provisions of the long will in which the power is contained. It is enough to say that we deem the direction in the 2d article, in respect to the sale and conversion of the real estate and the investment of the proceeds, sufficiently absolute and mandatory to authorize the exercise of the power by an administrator with the will annexed, in default of its exercise by the executors named in the will. It is true that the testator empowers his executors, "at their discretion," to sell and convert all his real estate; but the context leaves no doubt that this phrase was merely intended to relate to the time at which, and the circumstances under which, a sale might be made, and was not designed to vest them with any discretion whatever as to the question whether they should sell or should not sell. The testator manifestly intended that his real estate should be sold and that the proceeds should be invested in three separate funds. At the same time he left his executors at liberty to determine the precise time when the sale should be made, and left them at liberty to make it under such circumstances as should be most favorable to the parties interested.

We find nothing in the 10th article authorizing the executors to make needful repairs on the real estate, or in any other part of the will, which cannot readily be harmonized with the view we have taken of the character of the power conferred by the 2d article. We entertain no doubt that the sale by the administrator with the

will annexed conveyed a good title, and we think the purchaser should be required to complete his purchase.

The order appealed from should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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DEBORAH L. MANGAM, Appellant, v. THE PRESIDENT AND TRUSTEES  
OF THE VILLAGE OF SING SING, Respondent.

*Highway — what is not an abandonment of it.*

The nonuser of a portion of the width of a highway does not, where a sidewalk for foot passengers has at all times existed over the entire length of the highway in question, amount to an abandonment of the highway within the terms of 2 Revised Statutes (6th ed.), 163, section 160.

*Señble*, that a highway may be shifted to one side in such a manner and to such an extent as to create an abandonment.

APPEAL by the plaintiff, Deborah L. Mangam, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 29th day of May, 1897, upon the verdict of a jury; and also from an order bearing date the 19th day of May, 1897, and entered in said clerk's office, denying the plaintiff's motion for a new trial made upon the minutes.

The following statement appears in the opinion in 11 Appellate Division, 212, in reference to the character of this action:

"The action is ejectment, commenced in 1892 to recover a parcel of land situated within the village of Sing Sing, and described by metes and bounds in the complaint. In the deed of conveyance under which the plaintiff claims to have taken title it is described as bounded 'easterly by the Highland turnpike road; northerly and northwesterly by a road leading from the Highland turnpike road to the Farmers' landing; southerly by the churchyard or land of the First Baptist Church of Mount Pleasant, containing about one-eighth of an acre of land.' The Highland turnpike road has taken the name of Highland avenue, and the other road that of Main street. As now represented, Highland avenue on the east has a north-

westerly, Main street on the west a northeasterly course, and coming together at the apex of a triangle, having for its base a sidewalk on the south, adjacent to the north side of the house included in the above-described premises, and may be designated as the 'Hull Building.' This triangular piece of land is known as 'Pleasant Square,' and is the land in dispute. It may be observed that in the line of conveyances by deeds since 1814, the land intended to be conveyed is described substantially the same as in the deed first above mentioned, and in those of 1830, and since, of which there were several, the description is in the same language as it is in that deed.

"The main controversy of fact upon the trial has relation to the location of Main street at its approach to and junction with Highland avenue, at an early day when such description was given which was followed by the later deeds. The evidence on the part of the defendants is to the effect that, until after 1830, Main street turned quite abruptly to the east, went along close to the Hull building into Highland avenue, thus occupying what has later been the triangle, or a portion of it, as part of the street or highway. To that situation the description in the deeds would be alike applicable. In or about the year 1830, a house which had been erected by one Ward, on the northwesterly side of Main street, in its bow near the junction of the two streets, became the property of Trowbridge, and was by him moved back westerly about forty-five feet, and thereafter the main line of Main street was at that place moved further west, and its junction with Highland avenue was further north, thus apparently making the apex of a triangle. The evidence on the part of the defendants tends to prove such, and the further facts that, for many years thereafter, this triangular piece of land was open and used in common to pass over with teams and wagons, and that it remained open to such use until about 1852, when the trustees of the village, by one of their number, inclosed it with a chain upheld by posts. There is some conflict in the evidence of the parties as to the time this triangle was first inclosed. The defendants put a pump for public use, and (in 1857) a reservoir in the northern portion of it. There was evidence given to the effect that for many years after the Hull building was inclosed by one Bacon, in about 1830, Main street passed along adjacent to the north side of it, and that when the



building was used as a hotel, in and after 1840, carriages were driven from either way to the entrance on that side of it. The evidence, therefore, permitted the conclusion that this triangular piece of ground north of the Hull building was at one time part of the highway, and, therefore, that no part of it otherwise than subject to such easement as then existed in the public as a highway was conveyed by the deeds to the plaintiff and her predecessors.

“But it is urged on the part of the plaintiff that, although the location of the street may at one time have been as claimed on the part of the defense, it had at that place been abandoned and not used as a highway for more than six years before the commencement of this action, and that, consequently, she was entitled to recover the possession of the strip of land bounded on the north by the center of what had formerly been used as a highway.”

*Herman Aaron and John Hill Morgan*, for the appellant.

*Smith Lent*, for the respondent.

CULLEN, J. :

This action has already been before us on two previous appeals. (86 Hun, 604; 11 App. Div. 212.) In the reports of those appeals is to be found a full statement of the facts of the case, the evidence as to which has not varied in substance on the several trials. On the last appeal a judgment recovered by the defendant was reversed for error of the trial court in charging that the statute relating to the abandonment of a highway had no application to the case. On the trial, from the judgment entered on which the present appeal is taken, the question of the abandonment of a highway was submitted to the jury in accordance with the view previously expressed by this division of the court, and a verdict was rendered in favor of the defendant.

The only question that now requires examination or discussion is whether, on the undisputed evidence in the case, the part of the highway covering the *locus in quo* had been abandoned, so that the public easement of passage over it was terminated. According to the contention of the defendant, the highway ran immediately in front of the plaintiff's buildings. If this portion of the highway had ceased to be used as such, the soil would revert to the original owner,

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free from the public easement. Presumably the title to the land in the highway is in the adjacent owner, and there was nothing in the chain of plaintiff's title to take this case without the rule. The plaintiff requested the court to charge: "If the jury believe the old road existed as claimed by defendants, they must find that it was abandoned;" and also "The jury must, in any event, find a verdict in favor of the plaintiff for at least such portion of the formerly existing triangular piece of land in, as extends northwardly to the center line of, the old highway." These requests were refused, to which refusal the appellant properly excepted. These exceptions bring before us the question already stated. It is certain on the evidence that, at some period prior to the commencement of the present action, the defendant had surrounded the sharp point of the triangle by a post and chain fence; for what exact period is not certain. The fence was not taken away at any particular time, but was allowed to gradually go into decay, and fall down or be broken down. Between this plot thus fenced in and the line of the plaintiff's buildings there was at all times a sidewalk for foot passengers from one street over to the other; or at least the jury might have so found from the evidence. The appellant's contention is that this walk for pedestrians was not sufficient to take the case without the statute concerning the abandonment of highways, and that the *locus in quo* must at all times be subject to passage by vehicles or it ceases to be a highway. To this proposition we do not assent. We know of no provision of law which requires the whole width of a highway to be rendered traversable by teams or vehicles, or provides that such parts as are not used by teams and wagons shall be considered abandoned.

Section 160, 2 Revised Statutes, 163 (6th ed.), provides that "every public highway and private road already laid out and dedicated to the use of the public, that shall not have been opened and worked within six years from the time of its being so laid out, and every such highway hereafter to be laid out, that shall not be opened and worked within the like period, shall cease to be a road for any purpose whatever." Under this statute it has been held that when a highway or any portion of it has ceased to be passable by vehicles, the highway ceased. (*Horey v. Village of Haverstraw*, 124 N. Y. 273; *Excelsior Brick Co. v. Village of Haverstraw*, 142

id. 146.) But in both these cases they were longitudinal portions of the highway that had ceased to be passable; that is to say, that for some distance along the line of the highway the highway for its whole width had ceased to be passable, or used by the public. I know of no case where a part of the breadth of the highway was not traversable or used by the public, in which it has been held that such portion of the highway was abandoned and the public easement lost. On the contrary, the law is the reverse. No encroachment on a highway, whether maintained for six or for twenty years, destroys the public easement. In *Driggs v. Phillips* (103 N. Y. 77) the evidence tended to show that the plaintiff had occupied a portion of the highway with his building for over twenty years. It was held that there was no non-user of the highway; that the defendant's occupation was a mere obstruction and nuisance, a prescriptive right for which he could gain by no lapse of time. The cases of *Horey v. Village of Haverstraw* and *Excelsior Brick Co. v. Village of Haverstraw* (*supra*) in no respect overrule this decision. If the plaintiff's contention were sound it would lead to most remarkable results. In most villages, and in other densely-settled parts of the country, the central part of the highway is reserved for vehicles, and spaces on the side for walks for pedestrians, or sidewalks as they are called. Not only are these sidewalks not suitable for the passage of vehicles, but generally vehicles are forbidden to traverse them. Further, it is customary in many villages and cities to allow the abutting owner to inclose a portion of the highway adjacent to his building as a dooryard or an areaway. It has never been imagined that the effect of this mode of regulating or improving the highway, or these privileges granted to abutting owners, effected any abandonment of the highway or loss of the public easement. In *Beckwith v. Whalen* (70 N. Y. 430) it is said: "A highway cannot be said to be opened and worked unless it is passable for its entire length. It must be opened as a highway over its entire route. It need not be worked in every part, but it must be worked sufficiently to be passable for public travel." But there is not an intimation to be found anywhere that a highway must be worked for its full width. It may be confidently asserted that such is rarely, if ever, the practice. In *People v. Fowler*, a case of an alleged encroachment on a highway, at the Rockland Oyer and Terminer,

the court was asked to charge the jury that if, for the last twenty years, the highway, as used, had been outside of where the fence was, there was no encroachment; and also that the part of the highway lying east of the fence, not having been used or traveled as a highway by the public for more than six years, had ceased to be a highway for any purpose. Both these requests were refused. The court instructed the jury that no lapse of time could justify or legalize the encroachment. The conviction was affirmed by the Court of Appeals. (139 N. Y. 621.) Though, as already stated, the statute contemplates a case of the non-user of a part of the route of the highway as distinguished from a part of its width, we do not say that there might not be a lateral change or abandonment of the highway that would fall within its terms. A highway might be shifted to the side in such a manner and to such an extent as to leave a part of the old location abandoned. Such, indeed, is the effect of our previous decision in this case. But we held that the abandonment was a question of fact for the jury. From the evidence the jury might find that there had been public travel at all times by pedestrians, and for the major part of the time by vehicles, over the land in dispute. From such evidence they could find that there had been no non-user or abandonment of the highway, and, in that event, the unauthorized structures placed at times by the defendants in parts of the highway were mere obstructions which could no more destroy the public easement than if the same acts had been committed by the appellant.

The judgment and order appealed from should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. LIVINGSTON SICKLES, Appellant.

*Crimes — a crime charged as a second offense — proof, on the trial, of the former offense although the prisoner admits it — it is not violative of the Constitution.*

Section 688 of the Penal Code, relative to the effect of a former conviction upon the punishment to be inflicted in the case of a conviction for a second offense, is constitutional.

Where, upon the trial of an indictment for the crime of robbery, charged as a second offense, the accused pleads not guilty, and before the jury is impanelled admits a former conviction, proof of such prior conviction is admissible, on the trial, upon the part of the prosecution, as it constitutes an integral part of the crime charged. It must, when put in issue by a plea of not guilty, be passed on by the jury.

GOODRICH, P. J., and WOODWARD, J., dissented.

APPEAL by the defendant, Livingston Sickles, from a judgment of the County Court of Kings county in favor of the plaintiff, rendered on the 15th day of November, 1897, upon the verdict of a jury convicting the defendant of the crime of robbery in the first degree.

*Martin W. Littleton*, for the appellant.

*Josiah T. Marean*, District Attorney, for the respondent.

CULLEN, J.:

The appellant was indicted for the crime of robbery in the first degree, charged as a second offense. (Penal Code, § 688.) On arraignment he pleaded not guilty. When the trial of the indictment was moved, and before the jury was impanelled, the defendant admitted his former conviction, and sought to have evidence of such conviction excluded from the jury. This application was denied, and on the trial the first conviction was proved and the defendant convicted as charged in the indictment; thereupon he was sentenced to imprisonment for the term of twenty-one years. The sole question raised on this appeal is the admissibility of the evidence of the first conviction after the concession or admission made by the defendant before the trial.

That it is necessary that the indictment should charge the first conviction is settled by authority, and the question is not open to

debate. (*Wood v. The People*, 53 N. Y. 511; *Johnson v. The People*, 55 id. 512.) The plea of the defendant was not guilty. This put in issue every material allegation of fact in the indictment. There is no practice in this State which permits a defendant to admit part of the charges of an indictment and restrict the trial to the other charges put in issue. Whatever, therefore, may be the views of Mr. Bishop (Criminal Law, vol. 1, § 961) or of Mr. Wharton (Criminal Law, § 3418) as to the advisability of a procedure which would restrict the jury to passing upon the issue of the defendant's guilt of the particular act charged, and thus relieve him from the prejudice which might be excited by the proof of his prior offense, it is sufficient to say that the law of this State has not provided for any such practice.

The appellant, however, goes further, and claims that any provision of law which authorizes the People to prove a former offense, and to this extent prejudice the presumption of innocence to which he is entitled, is not due process of law, and, therefore, unconstitutional. On this question, also, we are concluded by authority. In *Johnson v. People* (*supra*) it was argued that it was error to receive evidence of the commission of the former offense, and thus show the prisoner's bad character before he had put his character in issue. The objection was held untenable. It was there said by CHURCH, Ch. J.: "A more severe penalty is denounced by the statute for a second offense; and all the facts to bring the case within the statute must be established on the trial. The objection that the evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried. Such evidence may be prejudicial to a prisoner as to the second offense, and a case might occur of a conviction upon too slight evidence, through the influence which a previous conviction of a similar offense might exert upon the minds of the jury; but there is no legal presumption that such a result will ever be produced. An English statute, passed in 1837, requires the principal charge to be first found by the jury, and then authorizes proof of the former conviction to be presented to them; but we have no such statute."

Though the point that the statute was unconstitutional is not directly discussed in the opinion, it is necessarily involved in the decision of the court. As the question is thus settled by authority,

we should not deem it wise to enter into its further discussion were it not for the reliance placed by the appellant on an expression to be found in the opinion in the case of *The People v. Raymond* (96 N. Y. 38). It was there said by Judge FINCH: "The first offense was not an element of or included in the second, and so subjected to added punishment, but is simply a fact in the past history of the criminal which the law takes into consideration when prescribing punishment for the second offense. That only is punished." That it is only the second offense which is punished is unquestionable; because after the defendant has expiated his first transgression by undergoing punishment therefor, it would be beyond the power of the State to punish him a second time for that offense. But I feel constrained to take issue with the proposition that the first offense was not an element of or included in the second, if that statement is to be construed as broadly as contended for by the appellant's counsel. It is first to be observed that in the *Raymond* case the former conviction was charged in the indictment and proved on the trial. There is nothing which prevents the Legislature from making an act committed by one who has previously been guilty of a crime, a greater offense than the same act when done by a person hitherto innocent of offense; and I think it is on this principle alone that criminal legislation of the character of that under discussion can be upheld as constitutional. The statutory provision as to punishing second offenses is not wholly exceptional. Section 85 of the Penal Code (which is but a re-enactment of the previous provisions of the Revised Statutes) provides for the punishment of escaping prisoners. A prisoner who, confined in prison, or being in lawful custody, by force or fraud escapes therefrom, is guilty of felony if such custody or confinement is upon a charge, arrest, commitment or conviction for a felony; and of a misdemeanor if such custody or confinement is upon a charge, arrest, commitment or conviction for a misdemeanor. Thus, two men breaking the county jail together, one confined for a felony and the other only for a misdemeanor, while guilty of precisely the same acts, would commit two different crimes — the one a felony and the other a misdemeanor. It is apparent that in such a case the state, condition, or what may be termed the previous history of the two offenders, is by the express terms of the statute an essential element of the crime itself. I concede that the Legis-

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lature may direct the places for incarceration of criminals of different classes, prescribing that women and children shall be confined only in penitentiaries or reformatory institutions, while men grown shall be punished in the State prisons, and that in such cases it is not necessary that the indictment should charge the age or sex of the defendant. It may be true that the Legislature may authorize the judge to mitigate the punishment of women or children. But under section 688 of the Code, for the second offense the defendant must be sentenced to at least the longest term provided as a punishment for the first offense, and may be sentenced for twice that time. It seems to me clear that the difference in the punishments necessarily constitutes a difference in the offenses, the distinction between which depends in no wise on nomenclature. It may be, if the constitutional provision as to cruel and inhuman punishments did not prevent, that we might go back to the old common law and make every felony punishable by death, in the discretion of the court. In such a case, the discretion being in the court as to all offenders, the fact that it might impose more severe punishment on one than on the other, would be no violation of individual rights. But if the law provided that, in case of conviction for certain offenses, one class of prisoners could be sentenced to only a year's imprisonment while another class must, without discretion in the court, be put to death, no refinement of reasoning can prevent us from seeing that the facts which constitute this classification must be integral parts of the offense itself.

The authorities cited from other States are not in opposition to this view. In *State v. Freeman* (27 Vt. 523) defendant was convicted of selling liquor under a statute which provided that the punishment should be increased if the defendant had been convicted of former offenses. Proof of former conviction could, by the statute, be made at any time before sentence. The validity of this legislation was upheld by the court on the ground that the offense was not a crime, but a mere violation of police regulation which the statute could have authorized the justice to determine summarily, without the intervention of a jury at all. The same principle was held in *State v. Haynes* (35 Vt. 570). But in *State v. Spaulding* (61 id. 505), the statute having been changed, it was held to be necessary to prove conviction of the former offense before the jury. In



*People v. Delany* (49 Cal. 394) it was held that if the defendant pleads guilty to the offense as charged in the indictment, where the indictment charges the offense of petit larceny committed after a previous conviction for the same crime, the plea confesses the offense charged, which includes the previous conviction. Whatever decisions are to be found in that State apparently in conflict with the one cited arise out of the peculiar practice at one time authorized by the Penal Code of that State. By section 1025, on an indictment for a second offense, the defendant was allowed to plead separately to the former conviction and to the new offense. If he pleaded guilty to the former conviction, but not guilty of the recent offense, then only the latter was passed on by the jury. But if he pleaded not guilty to both charges of the indictment, then both issues were determined by the trial jury. (See *Ex parte Young Ah Gow*, 73 Cal. 438.) These cases not only justify proof of the second conviction on the trial, but would indicate that in a case of serious crimes the charge of former conviction constitutes an ingredient of the crime, and must, when put in issue, be passed on by the jury. All that *Thomas v. Commonwealth* (22 Gratt. 912) is authority for is that the jury, in addition to the verdict of guilty, must specially find that the defendant had been formerly convicted.

The English practice, under the first statute enacted of this character, was to charge in the indictment and prove on the trial the prior conviction. (*Rex v. Jones*, 6 Car. & P. 391.) This practice was altered by statute so that on a plea of not guilty the jury first inquires into the subsequent offense, but if convicted of that offense then the prior conviction is submitted to and determined by the jury. The fact that, despite the change in procedure, the prior conviction is still to be found by the jury, would seem strong evidence that the jurists of that country were of opinion that such prior conviction constituted an integral part of the offense.

If the first offense is an ingredient of the crime charged, it must be submitted to the jury when the defendant pleads not guilty. We think it would be well if our criminal procedure were changed so as to accord with the English practice, and suffer or permit the defendant to sever his plea, allowing him to confess his former conviction while denying the recent offense. Such change, however, must proceed from the Legislature. As long as the law stands in

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its present condition no right of the defendant is violated by proving his prior conviction. In fact, in the case suggested of escape from prison, if done after sentence, we do not see how it would be possible by any change in the law to avoid proving the defendant's conviction of the crime for which he was imprisoned.

The judgment should be affirmed.

All concurred, except GOODRICH, P. J., and WOODWARD, J., dissenting.

WILLARD BARTLETT, J. (concurring):

While I should think it fairer to the accused person not to permit proof of a prior conviction of a prior offense until there had been a determination in respect to the offense presently on trial, I concur with Mr. Justice CULLEN in the view that the question involved in the present appeal is practically settled by authority. I also agree with him that it does not necessarily follow that proof that the defendant has committed a prior offense will bias and prejudice the jury in determining whether he has committed a second. But the word *necessarily* is of great importance in this proposition. That such proof has a strong tendency to prevent an impartial determination in respect to the second accusation I have no doubt.

WOODWARD, J. (dissenting):

The appellant was indicted for the crime of robbery in the first degree, charged as a second offense. On the arraignment he pleaded not guilty. When the trial of the indictment was moved, and before the jury was impanelled, the defendant admitted his former conviction and sought to have evidence of such conviction excluded from the jury. This application was denied, and on the trial the first conviction was proved and the defendant convicted as charged in the indictment; thereupon he was sentenced to imprisonment for the term of twenty-one years. The sole question raised on this appeal is the admissibility of the evidence of the first conviction after the concession or admission made by the defendant before the trial.

It was decided in the case of *Wood v. The People* (53 N. Y. 511) that it was necessary to charge in the indictment the fact of a previous conviction "An essential ingredient of the aggravated

offense," say the court, "charged upon the accused, was that the alleged felony was committed after a former conviction of an offense punishable by imprisonment in a State prison, and a discharge, 'either upon being pardoned, or upon the expiration of his sentence,' upon such conviction." This case came up under the provisions of the Revised Statutes (2 R. S. 699, § 8), which differ from the section of the Penal Code now under consideration, in that it was necessary to incur the additional penalty that the prisoner should have been discharged "either upon being pardoned, or upon the expiration of his sentence," and the court, without going into the constitutional aspects of the case, decided that it was not sufficient that the indictment should charge that the crime was a second offense, but that it should have contained the allegation of his discharge, "either upon being pardoned, or upon the expiration of his sentence." The judgment was reversed in behalf of the prisoner, and it determines only that, in the opinion of the court, it was equally as necessary to set forth the fact of the discharge as it was the fact of a second offense. Or, to be more exact, that it was necessary, in order to bring the defendant fairly within the provisions of the statute, that a discharge, as well as the previous conviction, should be alleged. This does not, however, meet the question presented in this case, and a careful search of the authorities fails to disclose any adjudication. We are asked to decide, not whether the allegations of an indictment are sufficient, but whether the Legislature is empowered to enact a law which deprives a defendant of the presumption of innocence guaranteed to him by section 389 of the Code of Criminal Procedure? The law under which this question arises is section 688 of the Penal Code, which provides as follows:

"A person who, after having been convicted within this State of a felony, or an attempt to commit a felony, or of petty larceny, or, under the laws of any State, government or country, of a crime which, if committed within this State, would be a felony, commits any crime within this State, *is punishable upon conviction of such second offense as follows:*

"1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a State prison for life;

"2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term prescribed upon a first conviction."

The essential error, as it seems to me, is in assuming that there is such a crime as robbery as a second offense. The chapter of the Penal Code devoted to robbery makes no mention of such an offense; it describes in detail what constitutes the crime in its various degrees, and names the punishments which shall be inflicted. Section 688 describes no such offense as robbery as a second offense, but it declares that a person who has been convicted of a felony or other crime "is punishable upon conviction" of a second offense by a more severe penalty than would be necessary for a first offense. The language is that "a person who, after having been convicted within this State of a felony, \* \* \* commits any crime within this State, is punishable *upon conviction of such second offense*." He is not to be convicted of the crime of robbery as a second offense, but of "such second offense," which is the crime for which he is apprehended and tried. That is, once having been convicted of a crime, if a person again "commits any crime within this State" he is, upon conviction of this last offense, to be punished more severely than in the case of a first offense. He is to receive no punishment for the first offense; that would be to place him twice in jeopardy for the same offense. But it being apparent to the law that his first punishment has failed to work that reformation which it is the policy of the law to promote, the discretionary power of the court is modified by the rule laid down in section 688 of the the Penal Code in respect to those who have been convicted of "such second offense." This is the proceeding prescribed by the Code in respect to habitual criminals. Section 690 provides that "where a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this State of any other crime, or where a person is hereafter convicted of a misdemeanor who has been already five times convicted in this State of a misdemeanor, he may be adjudged by the court, in addition to any other punishment inflicted upon him, to be an habitual criminal." (*People v. McCarthy*, 45 How. Pr. 97.) The duty of determining this question, which is not more serious than

that involved in the case of determining the fact of a prior conviction, which involves an increase of penalty, is left to the court by the provisions of section 690 of the Code, and it is difficult to show any good reason why the same method should not be pursued in the matter of a previous conviction, unless the defendant, after "conviction of such second offense," should elect to raise the question of identity, or some other material issue.

Assuming, however, that it was the intention of the Legislature that there should be a trial of the fact before the jury, have the People intrusted it with this power? Section 389 of the Code of Criminal Procedure provides that "a defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." This presumption of innocence extends, not alone to the crime with which he is charged, but to all other crimes; he is presumed to be free from all criminal taint, and the defendant not raising the issue by the introduction of affirmative evidence in his own behalf, the court has no right to allow any fact to go to the jury which disturbs this presumption, which is not germane to the crime with which he is charged.

The 1st section of the 1st article of the Constitution of this State provides that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers;" and it was held in the case of *Taylor v. Porter* (4 Hill, 140) that "the meaning of the section then seems to be that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation."

In a like vein is the language of Kent in his Commentaries (Vol. 2, p. 13), where he says that "it may be received as a proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or dispossessed of his freehold or estate, or exiled or condemned, or deprived of life,

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liberty or property, unless by the law of the land or the judgment of his peers. The words, *by the law of the land*, as used originally in Magna Charta in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord COKE, is the true sense and exposition of those words."

One of the rights and privileges secured to "any citizen" of this State is that presumption of innocence guaranteed by section 389 of the Code of Criminal Procedure, and which goes to the extent of a presumption of innocence of all crime; and this presumption cannot be said to exist, nor can the defendant be assured of a fair and impartial trial, if he is compelled to confront his accusers upon a second charge with the fact of his previous offense in evidence before the jury, and we are of the opinion that the Legislature has no power to pass an act destroying this presumption; that the fact of a previous conviction can have no place in the records or proceedings of the court until after it has been determined that there has in fact been a crime committed by the person charged with such crime. It then becomes a legitimate inquiry in determining the duty of the court in pronouncing sentence, and, in the absence of a controversy as to the identity of the defendant, there would seem to be no objection to the court taking judicial notice of the records of previous conviction, the same as in the case of an habitual criminal. However this may be, there can be no reasonable doubt of the fact that the defendant is entitled to all of the presumptions upon a trial for a second offense that belong to any citizen upon trial for a first offense, and as the statute provides that section 688 shall become operative only "*upon conviction of such second offense*" there can be no justification for establishing the fact of a previous conviction before the jury until after it has been determined that the second offense has in fact been committed by the person on trial. The Legislature would have no power to pass an act which would be valid which provided for such a proceeding.

This conclusion is not disturbed by the reasoning of the court in the case of *Johnson v. People* (55 N. Y. 512), because the constitutional question was not under consideration, and the court distinctly say that "the former conviction and discharge must be alleged in the indictment, and, *upon issue joined*, must be proved on the trial

and passed upon by the jury." There was no issue joined in the case at bar; the defendant admitted the fact of his previous conviction, and the admission of evidence bringing before the jury the fact of a previous conviction was clearly opposed to the rule which forbids the introduction of evidence as to character except when the way is opened by affirmative testimony in behalf of the defendant. "The objection," continues the court in the same case, "that the evidence may affect the prisoner's character, has no force when such evidence relates to the issue to be tried. Such evidence may be prejudicial to a prisoner as to the second offense, and a case might occur of a conviction upon too slight evidence through the influence which a previous conviction of a similar offense might exert upon the minds of the jury; but there is no legal presumption that such a result will ever be produced." It is true, as the learned court has aptly said, that "the objection that the evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried." But when there is no *issue before the jury to be tried, except the question of the subsequent crime*, it is manifestly improper to introduce evidence as to a specific fact in the history of the prisoner which can have no other effect than to destroy the presumption of innocence to which he is entitled, and which establishes a character and a disposition to crime. While it may be the case that there is no "legal presumption" that the evidence of a previous conviction might result in the conviction of a prisoner on too slight evidence, the courts have repeatedly reversed the trial courts for charges to juries which sought to discredit the evidence of previous good character, the reasoning tending strongly to the assertion of a contrary doctrine. In the case of *The People v. Lamb* (2 Keyes, 360) the trial court had charged the jury that "Good character, as all judges have charged juries, is a shield and protection where it is offered in doubtful cases, because it repels the presumption of guilt, but in a clear case it affords no protection. Yet, it is for you to say how far and what degree of weight you will give to that testimony. \* \* \* If you think it entitled to any weight, you can regard it; if you do not, you can reject it." Judge SMITH, delivering the opinion of the court, at page 378, says: "In so far as the charge left it to the *discretion* of the jury to utterly disregard the uncontradicted evidence of the defendant's good char-

acter (and it seems to have done so unqualifiedly) it was erroneous and prejudicial to the defendant. The true rule is that such evidence must, in any event, be considered by the jury, together with the other facts and circumstances of the case; it is not merely of value in doubtful cases, *but will, of itself, sometimes create a doubt where none could exist without it; and if good character be proved to the satisfaction of the jury, it should turn the scale in favor of the defendant, even in cases where, without it, the whole evidence would slightly preponderate against him.* (*Stephens v. The People*, 4 P. C. R. 396; *Cancemi v. The People*, 16 N. Y. 501; 2 Russ. on Crimes, 785, 786.)”

In the case of *People v. Clements* (42 Hun, 353) the court say that “‘It was error to charge the jury that, in any case, evidence of good character would be of no avail. There is no case in which the jury may not, in the exercise of sound judgment, give a prisoner the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbabilities, that a person of such character would be guilty of the offense charged; that the other evidence in the case is false, or the witnesses mistaken.’” The language used above is from the opinion of the court in the case of *Remsen v. The People* (43 N. Y. 6), and is quoted with approval in the case cited.

The same case is again relied upon in support of the conclusion of the court in the case of *People v. Wileman* (44 Hun, 187) where the decision of the trial court was reversed because of the charge to the jury, which declared that “‘when the evidence in the case satisfies the jury that the crime has been committed, and that the accused has committed the crime, then the evidence of good character is of no avail.’”

In the case of *Stover v. The People* (56 N. Y. 315) the case was again cited with approval, the court saying: “Good character of the accused is to be considered by the jury upon the question of the credibility of direct evidence of his guilt, the same as upon proof of circumstances tending to show it, or the inferences to be drawn from such circumstances.”

If good character is so important, if it may raise doubts in the



minds of the jury which could not "exist without it," and if "it should turn the scale in favor of the defendant, even in cases where, without it, the whole evidence would slightly preponderate against him," then the converse must be true, that evidence of bad character, of the actual commission of a similar offense, would tend to turn the scale against the prisoner when the evidence as a whole would slightly preponderate in his favor. If evidence of good character may serve to create a doubt in the minds of the jury where such doubt would be impossible without it, then it is fair to say that evidence of bad character, and especially in the same line as the case on trial, would be likely to remove the doubt where otherwise it might exist. But this is not a matter of argument; it is a fact within the knowledge of every intelligent man; the presumption of guilt is bound to assert itself in the mind of every man if he knows that the prisoner has been previously convicted of the same or a similar offense. It is the very groundwork of the suspicion, the investigation, arrest, trial and conviction in a very large percentage of the criminal cases.

In the case of *The People v. Raymond* (96 N. Y. 39), Judge FINCH, in delivering the opinion of the court, says that the "first offense was not an element of or included in the second, and so subjected to added punishment, but is simply a fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second offense. That only is punished." If this is the true construction of the statute, and it is the only one which does not come into conflict with that provision of the Constitution which forbids that a person shall be put twice in jeopardy for the same offense, then it can have no proper place in an indictment nor in the evidence which is to go before the jury, unless the prisoner chooses to open the way to its admission by offering evidence of previous good character. The previous conviction is merely a fact in the history of the prisoner; it is not a crime, nor does it constitute any part of the crime with which he stands charged; it is merely the record of the judgment in a trial, with the merits of which the jury in the case at bar cannot deal, and as such it has no more place in the records of the trial of a subsequent crime than any other fact in the history of the prisoner which is not connected with the offense for which he is on trial.

In New Jersey, where the Crimes Act provides that "All murder that shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape, etc., shall be deemed murder in the first degree; and that all other kinds of murder shall be murder in the second degree," it was urged that a special count was indispensable. The court, in the case of *Titus v. State* (5 Cent. Rep. 816), say: "The argument urged in support of the position, that a special count was indispensable whenever the State relied on any of the statutory particulars connected with the killing, to intensify such killing into murder, was that, as the act created and defined the defense, every constituent of the crime, embraced in such definition, must be stated in the indictment. But this proposition cannot be sustained, for it has been conclusively settled by the Court of Errors in this State, in the case of *Graves v. State* (16 Vroom, 204, 358), that the section relied on did not create any new crime, but 'merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder.' "

This is analogous to our statute in reference to second offenses; it creates no new offense, but merely makes a "distinction, with a view to a difference in punishment," between those who have been convicted a second time and those who have only been convicted of a first offense, and it is not only unnecessary to make a special count in the indictment alleging such second offense, but it is entirely out of place in the proceeding. While dealing with New Jersey, it is proper to note that, in the case of *Clark v. State* (4 Cent. Rep. 806), the Court of Errors, delivering its opinion through Judge REED, say: "The rule of evidence upon which this assignment is founded is entirely settled. As a general rule, the State, for the purpose of showing that the defendant would be likely to commit the crime charged, cannot prove that he committed other crimes, although of a like nature." This is unquestionably the rule in this State so far as it relates to crimes of which the defendant has not been convicted, and this brings us back to the question, Has the Legislature the power, under the Constitution, to enact a statute which denies to one citizen the rights and privileges secured to another? Has it

the power to enact a valid law which shall protect the unconvicted criminal in the presumption of innocence, while denying that protection to the man who, having been convicted, has paid the penalty of his crime? It is difficult to understand how there can be any two opinions upon this question. Either section 1 of article 1 of the Constitution is a barren ideality, or it inhibits just this kind of discrimination in the trials of persons charged with crime; and the mere fact that the contrary practice has prevailed for a long series of years, without the question being raised, cannot in any manner change the Constitution. It is not necessary, however, for this court to bring into question the action of the Legislature; the law, as it stands, is capable of a construction entirely consistent with the Constitution; the error and the wrong come from a misapplication of the law and not from the law itself. Archibold's Criminal Pleading (\*696), after setting forth the statute law of England in reference to subsequent offenses, says:

“Considerable difficulty formerly existed as to the course to be pursued under this statute. *A prejudice was created in the minds of the jurors by a knowledge of the previous conviction*, and yet in strictness that circumstance could not be withheld from their knowledge. To remedy this, the stat. 6 and 7 William 4, c. 111, was passed, and now the prisoner must be arraigned, and the jury must be charged and the evidence proceed, as if the indictment did not contain the averment of a previous conviction, and this allegation must not be opened to the jury, or their verdict taken upon it, until after they have found the prisoner guilty of the subsequent felony, and then the prosecutor must prove the previous conviction and identity of the defendant, and upon this, likewise, the jury must deliver their verdict. If, however, the defendant call witnesses to character (or if, by the cross-examination of the witnesses for the prosecution, evidence to character be elicited [*Reg. v. Gadbury*, 8 C. & P. 676]), the previous conviction may be proved in reply, and the compound question will, in that case, be left to the jury in the first instance.”

The Penal Code has been adopted in comparatively recent years, and, it may be assumed, with a knowledge of the practice in England; and if we read section 688 with this practice in view, we shall see that there is nothing in our statute inconsistent with the statute law

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in England, and that there is no good reason why we should not adopt that practice, especially as such a rule is necessary in order that the individual may be made secure in his constitutional rights. If we change the word "second" to "subsequent," which is the true meaning of the statute, we will get a clearer idea of the intention of the Legislature, and it will be easier to harmonize the law with the requirements of the Constitution and the dictates of justice. It will then, in so far as it is necessary to this discussion, read: "A person who, after having been convicted in this State of a felony, \* \* \* commits any crime \* \* \* is punishable upon conviction of such subsequent offense as follows." He is not to be convicted of a second offense as a distinct crime, but upon a conviction of a subsequent offense he is to be punished with greater severity than for a first offense. There is, in law, no second offense until the prisoner has been convicted; up to that time he is presumed innocent of the subsequent offense, and it follows, therefore, that there can be no question of a second offense which the jury may pass upon until it appears, as a matter of law, that the offense for which he is on trial has been committed by the prisoner. Once convicted of the subsequent offense, the question of a previous conviction comes up for consideration, and this may be established by the admission of the prisoner or by the records, coupled with evidence of the identity of the prisoner. If the court has not the authority to prescribe this rule, then the attention of the Legislature should be called to the fact, but there can be no excuse for a construction of a penal statute which deprives the prisoner of his constitutional rights, even though the court should be permitted to use its discretion in administering punishment. It is important to note in this connection that the section of the Penal Code now under consideration does not necessarily extend the term of punishment for the crime; it simply takes it out of the discretion of the court to make it less than the full punishment denounced against the crime, though it allows the court, in its discretion, to make the term twice that which is prescribed for a first offense. If, therefore, this court should decide that it was not proper to allow the evidence of a prior conviction to go to the jury under any circumstances, it would still be in the power of the trial court, in the exercise of a sound discretion, to sentence the

prisoner to a maximum term for first offenses, which would, in all probability, meet all the requirements of justice and sound public policy in a majority of cases. In other words, section 688 does not compel the trial court to do more than it may now do in sentencing a prisoner who has been convicted, and no material injury is likely to result to society if the discretion vested in the court, to double the terms of those who are convicted of a second offense, is made temporarily inoperative by the fact that there is no way provided to establish that the prisoner has been guilty of a previous crime, of which he has been convicted.

But there is a legislative provision which fully meets the requirements of this case. Section 483 of the Code of Criminal Procedure reads as follows: "After a plea or verdict of guilty, in a case where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the suggestion of either party, that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily at a specified time, and upon such notice to the adverse party as it may direct."

The court has a discretion in naming the punishment for a second offense, the latitude given being between the maximum sentence for the first offense and twice that term for the second, where the punishment is less than for life, and it requires no great stretch of the use of language to say that it has a discretion in all of the matters mentioned in section 688, as that section becomes operative only upon conviction of the second offense; and if this reasoning is correct, the only way consistent with the Constitution which has been provided by the Legislature of the State for determining whether it is in fact a second offense, is by such a process as is authorized in the section quoted above.

"Statutes enlarging or conferring personal rights," says Secretary Fish, in his instructions to Mr. Davis (Whart. Inter. Law. Dig. § 174), "are to be construed liberally, in contradistinction to those which abridge or take away such rights," and this rule is none the less applicable to constitutional provisions intended to preserve those rights. If we apply this rule to section 1, article I, as related to this question, there can be no doubt that the trial court was in error in admitting to the jury the evidence of a previous conviction; it

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destroyed that presumption of innocence to which the defendant was entitled in common with every other person charged with a crime, and it had a tendency to prejudice the jury against him, and to overcome that reasonable doubt which the evidence in the case, upon its merits, may have established. There can be no doubt that it would require less of evidence to destroy a reasonable doubt in the minds of a jury if they knew to a certainty that he had already been convicted of a previous crime, than would be the case where the prisoner was allowed the full benefit of the presumption of innocence to which he is entitled.

The judgment of the court below should be reversed, and the defendant should be given a new trial.

GOODRICH, P. J., concurred.

Judgment of conviction affirmed.

BRIDGET BURKE, as Administratrix, etc., of JOHN BURKE, Deceased,  
Respondent, v. JOHN B. IRELAND, Appellant, Impleaded with  
Others.

MARY SAVAGE, as Administratrix, etc., of MICHAEL SAVAGE,  
Deceased, Respondent, v. JOHN B. IRELAND, Appellant,  
Impleaded with Others.

*Negligence — an owner, employing an independent contractor, is not liable for the negligence of such contractor or of fellow-servants — liability of an owner, who furnishes an insufficient foundation ; who has employed a competent architect ; where an architect alters the thickness of a foundation — effect of the New York Building Law.*

An owner of real property who employs an independent contractor to erect a building thereon is not liable to employees of such contractor for the negligence of their master or of their fellow-servants, unless the owner either directed the negligent act to be done or took an affirmative part in its commission.

The fact that a contract made by the owner with the principal contractor provides that the owner shall have the right to inspect the materials and workmanship, modify the plans and vary the work, and that the work shall be done under the direction of the owner's architect, does not alter the owner's position as regards his liability.

Where the contract of the principal contractor does not include excavation, and he has no duty in this respect except to lay no concrete in the foundation trenches until they have been examined by the architect, the duty of providing a proper foundation for the concrete, and of determining the sufficiency of such foundation, rests on the owner or his agent; if there be negligence in this particular on the part of the agent or the owner, the fact that the principal contractor was also negligent does not relieve the owner from liability.

Thus, where the foreman of the principal contractor laid out a trench and, in violation of the contract, laid concrete in it in the absence of the architect, under whose supervision the contract provided that the work was to be done, and the architect accepted and passed the concrete work without having examined the bed on which it was laid, the liability of the owner for an accident resulting from the improper character of the soil upon which the concrete was placed, is to be determined by the jury.

Where a contract for the erection of a building provides that it shall be performed in accordance with the plans and specifications, and executed under the direction and to the satisfaction of the owner's architect, the architect has no power to authorize the contractor to reduce the thickness of a concrete foundation from the dimensions fixed by the plans and specifications, and the owner is not liable for the architect's negligence resulting from the fact that the concrete, as diminished in thickness, is insufficient to stand the strain put upon it; the act of the architect in authorizing the reduction in thickness is not within the scope of his employment.

An owner of land who has employed a competent architect to design a building to be erected thereon, and has fairly committed the subject-matter to him, is not liable to the employees of the contractors who have agreed with the owner to construct the building according to the design, for faults or defects in it of which the owner neither knew nor should have known, provided the deficiencies or defects in the design did not proceed from his interference or direction.

Where the building as erected is inherently defective and dangerous, the owner is *prima facie* responsible for its condition, and if he desires to escape liability upon the ground that he employed a competent architect, and acted upon his advice, it is incumbent upon him to prove such facts affirmatively.

*Seem*, that the Building Law, relative to the city of New York (Laws of 1892, chap. 275), prescribing the manner in which structures are to be built, does not make the owner an absolute guarantor that the building will comply with the statute.

APPEAL by the defendant, John B. Ireland, from a judgment of the Supreme Court in favor of the plaintiff in the first above-entitled action, entered in the office of the clerk of the county of Kings on the 29th day of October, 1896, upon the verdict of a jury for \$10,000, and also from an order entered in said clerk's office on the 28th day of October, 1896, denying the defendant's motion for a new trial made upon the minutes.

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Appeal by the defendant, John B. Ireland, from a judgment of the Supreme Court in favor of the plaintiff in the second above-entitled action, entered in the office of the clerk of the county of Kings on the 10th day of June, 1897, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 29th day of May, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Benjamin F. Tracy* [*Ira D. Warren* with him on the brief], for the appellant.

*Charles J. Patterson*, for the respondents.

CULLEN, J. :

The first action is brought by the plaintiff as administratrix of her deceased husband, who was killed by the collapse of a building in the course of erection on the land of the appellant. The appellant and John H. Parker entered into an agreement whereby Parker contracted to erect the building according to certain plans and specifications prepared by one Behrens, an architect. Parker entered into a sub-contract with John M. Cornell, by which the latter agreed to furnish the structural iron work requisite for the building, and into another sub-contract with Joseph Guider, who agreed to do the plastering. The construction of the building had so far proceeded that, at the time of the accident, the roof was on, and the building in part inclosed. The plaintiff's intestate at the time was engaged as a plasterer in the employ of Guider, the sub-contractor. While the building was at this stage of construction it collapsed, and by its fall many persons, including plaintiff's intestate, were killed or injured. The plaintiff brought this action against the appellant as owner, Parker as contractor, and Cornell as sub-contractor, alleging negligence in the prosecution of the work, which caused the building to collapse. On the trial evidence was given tending to show that the plans and specifications of the building were faulty and defective ; that a building erected in accordance with such plans would not be reasonably safe or secure, and that in some respects the plans and specifications were in violation of the Building Law (Laws of 1892, chap. 275). Evidence was also given tending to show that the foundation of



the pillar, which probably first failed, and thus brought on the fall of the building, was improper, in that the thickness of the concrete was insufficient to bear the weight imposed on it, and also because the concrete was laid in part over earth and in part over an old cistern wall, which resulted in unequal settling of the foundation, and thus caused it to break. There was further evidence to the effect that the iron pillars designed to carry the floors were insufficient in size, and that one of the pillars at the point where the building first failed was of improper quality and character and defective workmanship. The contract called for concrete foundations eighteen inches thick. It appeared by the testimony of Murray, the foreman of the contractor Parker, that the concrete was laid only twelve inches thick, and Murray testified that this change was made in pursuance of directions given to him by the architect, Behrens. The contract between Ireland and Parker did not cover the whole improvement, for the clearing away of the old structures on the land, and the excavation of the ground had, at the time of the execution of the contract, already been let to another person, one Joseph Garry. It also appeared from the testimony of Murray that he gave the directions to Garry to make the excavation for this pier, and that Behrens, the architect, did not see the excavation until it was filled up with concrete. Parker's contract contained this specification: "No concrete shall be laid in trenches until same has been examined by the architect, as concrete must not be laid on a disturbed bottom. No finished concrete work will be accepted unless same has been approved by the architect before being covered over or built upon." It was also shown that during the progress of the work the plan of the building was modified by the erection of an additional story. On the trial the plaintiff contended that Cornell was guilty of negligence in furnishing defective iron work; that Parker was guilty of negligence in the improper construction of the foundations; and that the appellant was guilty of negligence in the character of the plans of the building, in the acceptance of improper foundations for the structure, and in the failure to require Parker and Cornell to prosecute their work properly and conform to the provisions of the contract. The jury rendered a verdict against the appellant Ireland, acquitting the other defendants, and from a judgment entered upon that verdict this appeal is taken.

With the argument of the appeal in this case we heard the appeal from a judgment in the second action brought to recover damages for the death of another man killed by this same accident. The two causes were tried separately, and the evidence varies to such an extent that different rules govern the disposition of the two cases, and it has, therefore, become necessary for us to consider them to some extent separately. In the present case, neither the appellant, the architect, Behrens, nor the principal contractor, Parker, became a witness.

The first contention of the appellant is that his motion for a nonsuit should have been granted. It is insisted that he performed his whole duty when he employed a competent architect and a competent builder, and that he is not liable for any negligence of the architect in the preparation of the plans, nor for the negligence of the contractor in the prosecution of the work, unless he knew of these defects. It is a sufficient answer to say that the question of how far an owner, being a layman, may be relieved from liability for the construction on his land of a dangerous or defective building, by the employment of a competent and proper architect, does not arise on the facts in this case. It does not appear, except from the recitals in the contracts, that Behrens was an architect at all, much less that he was a competent or proper one; nor does it in any way appear that Behrens was responsible for the plan and character of the building and that the appellant was not. For aught that there is in the record before us the whole plan and character of the building, the size of the foundation, of the walls, of the posts and the girders, may have wholly proceeded from the direction of the appellant. The duty or discretion of an architect is confined within such limits as his employer imposes upon him. The appellant having contracted for the construction of this building, if the building was inherently defective and dangerous, *prima facie* he is responsible therefor, and if he can escape liability for such inherent weakness and danger by the employment of an architect, and his acting upon the architect's advice, it was incumbent on the appellant to affirmatively show those facts. Therefore, the employment or advice of the architect is not an element in this case. In this view of the evidence the case is entirely similar to that of *Pitcher v. Lennon* (12 App. Div. 357). In that case the owner of a building in the course of construction, who had prepared

the plans of the building and supervised its erection, was held liable for the death of one of the workmen caused by the collapse of the structure in consequence of insufficient strength resulting from the design of the building and improper material used in its construction. The liability was chiefly placed on the proposition that the structure as designed and planned by the owner was in violation of law, but the opinion is careful to assert that the recovery might be upheld on other grounds. The appellant knew that in the course of construction of the building necessarily many persons would be engaged in work upon it, and that any weakness or insecurity in its design or construction would be imminently dangerous to human life. In such a case a party is responsible for his negligence whereby third persons are injured, even though he has no contractual relations with such persons. (*Coughtry v. The Globe Woolen Co.*, 56 N. Y. 124; *Devlin v. Smith*, 89 id. 470; *Davies v. Pelham Hod Elevating Co.*, 65 Hun, 573.) The motion to dismiss the complaint was, therefore, properly denied.

But, though the appellant was responsible for the defective design of the building, I do not think that he was necessarily responsible for any negligence by Parker in the execution of the contract. The respondent contends that the Building Law, which prescribes the manner in which structures are to be built, makes the owner an absolute guarantor that the building erected will be in compliance with the statute. The general rule is that the owner of real property is not responsible for the negligent act of an independent contractor who performs work thereon. To this rule certain cases are exceptions, as where the act which the owner has directed to be done itself creates the injury or is imminently dangerous. There is another class which forms an exception, where the duty is imposed by law or the act done is authorized only by some special franchise or privilege granted the owner. A chute or coal hole maintained in the street by the owner of the abutting property, and excavations in the highway made in the course of laying a railroad or gas mains therein, are examples of the latter class, and in such cases the person exercising the privilege or franchise must see to it, at his peril, that the contractor properly guards the obstructions created in the street. But the owner obtains by the Building Laws no privilege to construct buildings on his property. He has the right to improve his property

as he will (not creating a nuisance), without the authority of any statute, and the Building Laws merely limit, in the exercise of the police power, existing rights; they do not confer any. If the structure erected, or in the course of erection, becomes a nuisance, the owner, even though he be not responsible for its original condition, doubtless at some point of time becomes responsible to third parties for its maintenance. (*Vogel v. Mayor*, 92 N. Y. 10; *Timlin v. Standard Oil Co.*, 126 id. 514.) But that principle is not at all applicable to the present case. None of the workmen on the building were the servants of the owner of the land, but either those of the contractor or of the sub-contractor. The owner did, under the doctrine already discussed, owe such persons the duty of not imperiling their lives by his own negligence or affirmative act; but I know of no principle under which there rested upon him any obligation for their preservation from the negligence of their master or of their fellow-servants. In fact, I should be inclined to think they were as well able to judge the character and competency of their master or of his co-contractors or their co-servants as the owner was, and at all times the determination whether to continue in the service or leave it rested solely upon them. "Where one employs a contractor to erect a building, the contractor is the principal of those whom he employs, and it is for them to inquire into his character for skillfulness and carefulness; the employer of the contractor is not a guarantor for his skill and care." (*Hunt v. Penn. R. R. Co.*, 51 Penn. St. 475.) Nor is there anything in the terms of the contract between the appellant and Parker to take this case out of the general rule. A right of inspection of the materials and workmanship was reserved, but was reserved solely for the benefit and security of the owner, who, at his pleasure, might dispense with it. This provision created no duty on the part of the owner in behalf of the contractor's workmen. Neither the right of the owner to modify or change the plans of the building and direct new work or dispense with work called for by the plans, nor the provision that the work should be done under the direction of the architect, created the relation of master and servant between him and the contractor. (*Pack v. The Mayor*, 8 N. Y. 222; *Slater v. Mersereau*, 64 id. 138.) Therefore, to render the appellant liable for the negligent act of the contractor it must be made to appear

that the former either directed the act to be done or took an affirmative part in its commission.

The evidence on the trial tends to establish that one of the most probable causes of the collapse of the building was the defective character of the foundation under the pillar, where the concrete was laid partly over earth and partly over the old cistern wall. Such, too, is the claim of the counsel for both parties. The question of who was responsible for the defective character of that foundation is not free from doubt. Parker's contract did not include the excavation. Under the specifications, a uniform thickness of eighteen inches of concrete for the piers is prescribed. No provision whatever is made, either in the contract or in the specifications, for the contingency that excavation to the depth of two feet might not find soil on which it was safe to rest the foundation of the piers which were to carry the walls or columns. It might have eventuated, as probably was the actual case, that it was necessary to excavate below the bottom of the cistern wall before it would be safe to commence the laying of the concrete foundation. Or it might even have happened that quicksand would be found, and it would be necessary to drive piles or adopt some other special means to provide a secure place on which to lay the concrete. Under the contract no duty was devolved upon Parker in these respects except one, *i. e.*, that no concrete should be laid in trenches until they had been examined by the architect. The duty, therefore, of providing a proper foundation upon which the concrete was to be laid, and of passing upon and determining the sufficiency of that foundation, rested on the owner or his agent. If there was negligence in this respect by the owner or agent, it would not absolve the former from liability, even though the contractor was also careless. The evidence tends to show that the trench was laid out by the foreman of Parker, the contractor, and that the excavation was made and the concrete laid in the absence of the architect. (In the second case the evidence is different.) On this state of facts, and assuming that the foundation was improper, the negligence of the contractor's foreman is plain, for the specifications provided that he should not lay concrete until the trenches had been inspected by the architect. But it does not necessarily follow that the architect or superintendent of construction was not also to

blame. There is evidence tending to show that he absented himself from the building during the time the foundations were being excavated, and also that he accepted and passed the concrete work without having examined the bed on which it was laid. It may be that the fact that the concrete had already been laid before his attention was called to the trench might be a sufficient excuse for his conduct, and that even a careful man might have been deceived as to the character of the foundation. This, however, was a question of fact for the jury. Therefore we cannot say, as a matter of law, that the appellant was in no wise responsible for an accident occasioned by the improper character of the soil on which the concrete was placed.

There was also evidence to the effect that the concrete was of an insufficient thickness. Murray, the contractor's foreman, testified that the thickness was reduced from eighteen inches to twelve inches by the direction of the architect. On this question the trial court charged the jury, "If you find that twelve inches was not sufficient to sustain the weight of that superstructure, you will find that the defendants Ireland and Parker were guilty of negligence which contributed to the death of Mr. Burke." To this charge the appellant excepted, and also asked the court to instruct the jury that the architect had no power to authorize the contractor to reduce the thickness of the concrete. This request was refused, and the appellant excepted. We are of opinion that the instruction and the refusal to charge were erroneous. In this case (it is otherwise in the second case) there is no evidence to show that the architect had any power or authority except such as appears in the contract. The contract provided that the work should be performed in accordance with the plans, elevations, specifications and drawings, and that it should be executed under the direction and to the satisfaction, in all respects, of Behrens, or other architect of the owner. This provision did not authorize the architect to modify the plans or relieve the contractor from doing the work called for by his contract. (*Glacius et al. v. Black*, 50 N. Y. 145.) Therefore, for neglect in this respect, the appellant was not liable, as the act of the architect was not within the scope of his employment.

There are also several errors in the rulings of the trial court in rejecting the testimony of appellant's witnesses as to the cause of the accident, which, we think, was competent expert evidence.

But, as they may not occur on another trial, we deem it unnecessary to discuss them. For these errors the judgment and order appealed from must be reversed and a new trial granted.

The second action (*Mary Savage, etc., v. John B. Ireland, etc.*) is brought to recover damages for the death of plaintiff's husband, which was caused by the same accident detailed in the first case. In this case the evidence varies from that given in the first case. There was testimony given by the appellant Ireland tending to show that the plans and specifications for the building were designed and prepared by the architect Behrens, and that the latter was an architect in good professional standing. It might also be inferred, from the testimony of the appellant, that he had given Behrens power to modify the plans and specifications. The testimony on this trial does not clearly show that Behrens, the architect, was not present when the trench was dug for the concrete foundation on which the pillar that collapsed was to rest. In other respects the evidence was substantially the same as that given in the earlier case. The course of this trial differed from the other in that the court declined to submit the question of the defects in the plan and design of the building and its dangers to the jury, but left the question of the appellant's liability to be determined by his negligence or misconduct in the performance of the work itself.

In disposing of this appeal, it is unnecessary to go over the discussion of the law which we have entered upon in the preceding case. We think there are at least two errors fatal to the plaintiff's recovery. The appellant asked the court to charge that "the defendant Parker was an independent contractor, and for the negligence of Parker or of his servants, the defendant Ireland was not liable in this action;" and also, "the defendant Ireland is not responsible for the poor material, poor casting or blowholes in the column on the sixth floor. If the jury find that the collapse was caused, as claimed by the plaintiff, by the failure of the column on the sixth floor by reason of its weakness caused by uneven casting, blowholes and poor iron, they must find a verdict for the defendant Ireland." Both of these requests were refused, and to such refusals the defendant properly excepted. Under the view of the law which we have already expressed, that the owner was not liable to the contractor's servants,

or sub-contractors and their servants, for the negligence of any of those persons in the performance of the work, the appellant was entitled to have both of these requests charged. The respondent criticises the second request as improper, in that it failed to limit its application to the case of a finding that the defective iron was the sole cause of the collapse; in other words, that the defendant's negligence in other respects might also have contributed to the fall of the structure, and that in such case the fact that he was responsible for only one of several concurring causes would not relieve him from liability for the disaster. The legal proposition thus asserted is doubtless correct, but we do not regard the request as subject to the criticism passed on it. We think the request fairly referred to the defective column as being the sole cause of the falling of the building. However this may be, no such criticism can be passed on the first request. That presents only the question of the negligence of the contractor and the appellant's responsibility therefor. He might be responsible for negligence as to the same matter as to which the contractor was also negligent; but then, in our view of the law, his responsibility would be solely for his own negligence and not for the negligence of the contractor. For these errors the judgment must be reversed and a new trial granted.

Thus far we have not discussed the question which, though not presented by either appeal, is necessarily involved in the cases, and will in all probability arise on a new trial — the question of how far the owner of real property is liable for the defects or errors in the design of a building, for the erection of which he contracts, proceeding from the negligence or misconduct of his architect. The question is one of doubtful solution and of uncertain answer. We have been able to find no authorities bearing directly on the subject. The question, so far as it can arise in these litigations, is only that of the owner's liability to his contractors or their workmen, and not to other parties. As between a master and his own workmen, the master is bound to use reasonable diligence to provide a safe place to work and safe appliances with which to work; and this being the master's duty, the fault or neglect of any subordinate to whom he commits the work is not that of a fellow-servant, but of the master himself. This, however, is subject to qualification. Where the



master has no knowledge or experience in the business of furnishing appliances or erecting structures, and contracts with a competent party to furnish or erect them, he is not responsible for defects that may exist in them, unless he knew or had reason to know that such defects existed. So in *Devlin v. Smith* (89 N. Y. 470), where it was necessary that a scaffold should be built to enable painters to paint the dome of a building, and the scaffold fell from defective construction, killing one of the journeymen, it was held that his employer, the boss painter, was not liable, as he had contracted for the erection of the scaffold by a competent and reputable builder, though he might have been responsible had he assumed the construction of the work himself or by his servants. To the same effect see *Butler v. Townsend* (126 N. Y. 105). The whole theory of liability imposed upon the master in this class of cases is for his personal negligence or fault; and he is only liable for the acts of other persons when such persons are discharging the duty that he should have done or assumed to do himself. In the conduct of a manufacturing business the tools and appliances constantly wear out or become defective by use or accident. It may, therefore, be properly said that the repair or replacement of defective tools and appliances is a part of the conduct of the very business upon which the employer has entered. But a layman, neither a builder nor an architect, cannot be expected to know the strength of various structures, the strain on their various parts, or the requisite size or strength of the materials to carry those strains. It is also to be borne in mind that in this case it was the very work in the performance of which the plaintiffs' intestates were engaged that failed and caused their death. The question is, therefore, not strictly that of a proper place to work or appliances to work with, and there rests upon the owner a different degree of liability to those who may be engaged in the erection of a building from that which he bears to those who may use the building after it is erected. (*Stourbridge v. Brooklyn City R. Co.*, 9 App. Div. 129; *Murphy v. Boston & Albany R. R. Co.*, 88 N. Y. 146.) We think that in such case, where an owner employs a competent and skillful architect to design the building, he is not responsible to the employees of contractors who agree to construct the building according to such design for faults or defects in the design of which he neither knew nor should have

known. Of course, to relieve the owner from liability, it must appear that he fairly committed the subject-matter to the architect, and that the deficiencies or defects of the design did not proceed from his interference or direction.

The judgments and orders appealed from should be reversed and a new trial granted, costs to abide the event.

All concurred, except GOODRICH, P. J., not sitting.

Judgment and order (in each case) reversed and new trial granted, costs to abide the event.

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JOHN R. DRAKE, Respondent, v. THE NEW YORK SUBURBAN WATER COMPANY and THE ATLANTIC TRUST COMPANY, Appellants, Impleaded with THE NEW YORK AND MOUNT VERNON WATER COMPANY, THE NEW YORK CITY SUBURBAN WATER COMPANY and THOMAS P. WICKES, as Receiver, etc., of COFFIN & STANTON.

*Corporation — validity of an issue of nearly all the stock to a construction company — binding force of a former adjudication that a consolidation of companies was valid — estoppel created by the acquiescence of a stockholder in the acts of the corporation — the rights of corporate creditors must be first protected in adjudicating as to those of the stockholders.*

Where a water company, having no creditors and only three stockholders, each holding one share of stock, enters, with the consent of two of the stockholders, and without objection on the part of the third, into a contract for the construction of its plant, whereby it agrees to pay the constructing firm, among other things, the balance of its entire issue of stock, and the contract is fully performed on both sides, a person who subsequently buys stock which was issued to his assignor in payment for services rendered to the constructing firm, cannot be heard to assert that the contract was invalid upon the ground that it was executed in fraud of the rights of the stockholders; this is certainly the case where he does not offer to restore to the constructing firm the value paid by it for the stock.

A judgment in an action adjudging that the proceedings to effect a consolidation of two corporations were valid, is, although not pleaded, conclusive evidence of that fact, where it becomes an issue in an action brought against the corporations by a stockholder acquiring his stock through, and who is in privity with, one of the plaintiffs in the first-mentioned action in which such judgment was entered.

It is the duty of a stockholder, if he desires to set aside acts of the corporation, to act promptly, and in failing to do so he becomes bound by his acquiescence

therein, and is estopped from asserting any right as against a person who has in good faith dealt with the corporation and received its securities.

A delay of several years held to be fatal.

The rights of a stockholder are subordinate to those of creditors of a corporation, and the courts will not approve any judgment which directs a sale of all the property of certain corporations in the interest of a stockholder, or of one particular class of stockholders, and which makes no provision for the payment of creditors.

APPEAL by the defendants, The New York Suburban Water Company and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 23d day of September, 1897, upon the decision of the court rendered after a trial at the Westchester Special Term.

The New York and Mount Vernon Water Company was organized in January, 1886, pursuant to the provisions of chapter 40 of the Laws of 1848. Prior to this time, and in 1873, the Mount Vernon Water Company had been incorporated with a capital of \$25,000. The two above-named companies came into existence for the purpose of supplying the village of Mount Vernon with water. The first named of these companies, upon its organization, purchased the stock of the other company, paying therefor its full par value. Thereupon the village, through constituted authority, granted to the New York and Mount Vernon Water Company and to its successors and assigns the exclusive privilege of constructing, maintaining and operating its water works in said village for a period of twenty years. The terms and conditions of this ordinance were accepted by the company, and the same became operative for the purpose contemplated. On March 20, 1886, three shares of stock of the company were issued, evidenced by certificates 1, 2 and 3, to F. Hopkinson Smith, George H. Holt and G. D. L'Huilier respectively. On the same day the same company, through its president, F. Hopkinson Smith, entered into a construction contract with Inman Bros., a copartnership composed of William F. and George B. Inman. By the terms of this agreement the Inmans were to acquire all land, water rights and privileges necessary for the construction, maintenance and supply of the water works, and to transfer the same to the company; also to acquire, at their own cost and expense, permanent rights of way in and through all private property adjacent to the village, for running, repairing and maintaining pipes, machin-

ery, reservoir plant, etc., of the company; also to furnish all labor and material required to lay the pipes, construct the mains and place hydrants and appurtenances in compliance with the ordinance of the village, and in accordance with certain plans and specifications of the company. The company agreed to pay for such construction \$199,700 of its capital stock, being its entire issue of capital stock, less the three shares issued as heretofore stated; also \$125,000 in the first mortgage twenty-year bonds of the company, or such amount of bonds as should be determined upon by Smith, Holt and George B. Inman, the exact amount to represent a fair compensation for the work done under the contract, including a contractor's profit of fifteen per cent; these sums to be in full payment of the cost of construction, excepting land for a permanent structure, mentioned in the 1st section of the contract, and the damages, if any, sustained by adjacent property, unless otherwise mutually agreed. These bonds were to be a part of a series of 200 of \$1,000 each, with interest coupons attached, and were to be secured by a mortgage upon the property of the company. The stock was to be delivered upon the execution of the agreement, and the bonds as the work progressed and as determined by the trustees of the company. Upon the execution of the contract the company delivered to Inman Bros. certificate No. 4 for 1,997 shares of stock. On the same day Inman Bros. entered into a contract with the firm of Taintor & Holt, bankers, composed of Giles E. Taintor, George H. Holt and G. D. L'Huilier, for a sale of the stock and bonds secured by virtue of their contract with the company. By the terms of this agreement, Inman Bros. were to sell \$101,000 of the capital stock, being 1,010 shares, and \$125,000 of the first mortgage bonds for \$112,500, the same being the equivalent of \$900 for each bond and the stock. The stock was to be delivered at once and the bonds as received from the company. Taintor & Holt agreed to pay the purchase price as the work progressed, not to exceed sixty per cent in value of the work performed and materials furnished, and only upon the certificate of Smith that the work and materials were furnished in accordance with the contract between the company and Inman Bros.; the remainder to be paid to Smith upon the completion of the work in pursuance of the contract, and the acceptance of the work by the village authorities as provided in the ordinance. Inman Bros. completed their contract

on the 16th day of August, 1886, and Taintor & Holt paid the money as agreed. Thereafter the works were operated by the water company. Inman Bros. surrendered the first certificate issued to them and transferred a part of the remaining shares held by them. Among the shares, 430 were transferred to Moses R. Crow, represented by certificate No. 5. Crow subsequently surrendered this certificate and procured certificates numbered from 26 to 33 inclusive, each certificate representing ten shares of stock. The last certificate he transferred to Henry Huss on the 26th of June, 1886, in payment for services rendered to Crow and Inman Bros. in procuring water rights, abstracts of title and other information, during the construction of the works. On the 11th day of January, 1887, Huss surrendered this certificate, and procured certificate No. 41 for ten shares, to be issued to him which he thereafter and on September 8, 1896, transferred to the plaintiff in this action, together with all rights and interests which in anywise accrued to him by reason of such ownership.

In pursuance of its contract with Inman Bros., the water company made and executed a mortgage on the 1st day of May, 1886, to the Central Trust Company of New York to secure its bonds to the amount of \$200,000, payable in twenty years, with interest. The consent of the stockholders of the water company to the execution of this mortgage was duly given, and among such consenting stockholders was Crow. In July, 1887, the water company executed a second mortgage to the same mortgagee to secure the payment of an additional \$100,000 of bonds. This mortgage had the consent of all the stockholders of the water company, including Henry Huss, who then held ten shares. On the 1st of August, 1889, the water company, needing more money, executed a third mortgage to the same mortgagee to secure the payment of \$200,000 of its bonds. This mortgage became a second lien upon the property, as the bonds secured by the second mortgage were exchanged for the bonds secured by the third, and the second mortgage was satisfied and discharged of record. The third mortgage was assented to by stockholders representing 1,905 shares out of 2,000. On March 26, 1891, a majority of the stockholders of the water company determined to increase its capital stock and extend its operations. Acting under the advice of counsel a new

company was incorporated under the name of the New York City Suburban Water Company, with a capital stock of \$1,500,000, divided into 15,000 shares of \$100 each. This company was created for the purpose of consolidating with the New York and Mount Vernon Water Company, and in reality of merging the latter into the former. After the incorporation of the Suburban Company, and on the 22d day of April, 1891, it executed a mortgage to secure an issue of \$1,500,000 of bonds. This mortgage was assented to by all of its stockholders. At this time, however, but ten shares of stock had been issued, which the consenting parties held. The recital in the assent of the stockholders is that they own and hold the entire capital stock thereof according to the provisions and intent of chapter 163 of the Laws of 1878. On the twenty-eighth day of April following an agreement was made and entered into by and between the trustees of the two last-named companies for the consolidation of the two into one. This agreement provided, *inter alia*, that the name of the new company should be the New York City Suburban Water Company; that its object should be to supply water to the village of Mount Vernon; that the new corporation should succeed to and be held liable to pay all the debts and liabilities of the consolidated corporations, and in particular that the mortgage of the New York City Suburban Water Company, executed to the Atlantic Trust Company, as trustee, should be an obligation of the consolidated company as to the entire issue of bonds, the same as though such mortgage had been issued after consolidation; that the bonds should be held by the trustee or be disposed of by it for the benefit of the consolidated company. Shares of stock of the consolidated company, equaling the capital stock of the New York and Mount Vernon Water Company, and the ten shares of stock issued by the Suburban Company, were to be issued in lieu thereof and exchanged therefor. The remainder of the stock was to remain unissued at the time of consolidation, or, if issued, it was to be represented by its par value in the treasury of the consolidated company. It was further agreed that any stockholder not consenting to consolidation should not be prejudiced by the valuation fixed by the agreement, but should have all the rights to a cash valuation of his stock or otherwise, as allowed by law.

After the execution of this contract a meeting of the stockholders

of the New York and Mount Vernon Water Company was called for the 8th day of June, 1891, to determine whether consolidation should take place, pursuant to the terms of the written agreement, a copy of which was sent with the notice calling the meeting. A copy of this notice and agreement was received by Huss. On the 6th day of June, 1891, Huss and one Cameron, stockholders of the New York and Mount Vernon Water Company, began an action in the Supreme Court to restrain the proposed consolidation upon the ground that the same was illegal, and procured an injunction restraining the said companies from proceeding further in the matter. This action brought in as parties defendant the New York and Mount Vernon Water Company, the trustees of said company, the Mount Vernon Water Company and the New York City Suburban Water Company. A motion was made at a Special Term to dissolve the injunction, which was denied. Thereupon an appeal was taken to the General Term, where the order denying the motion was reversed, and the injunction was dissolved. From this order the plaintiffs appealed to the Court of Appeals, where the same was affirmed. While the appeal to the Court of Appeals was pending a stipulation was entered into by the parties, to the effect that if the order was affirmed upon its merits the complaint should be dismissed upon the merits, and the judgment should recite that the Mount Vernon Water Company did not seek to and would not consolidate with the other defendants or either of them. Upon the affirmance of the order a judgment was entered August 12, 1892, pursuant to this stipulation, whereby it was adjudged that the complaint of the plaintiffs be dismissed upon the merits, and that the plaintiffs were not entitled to the preliminary injunction. Pending this action, and pursuant to the notice hereinbefore referred to, the stockholders of the New York and Mount Vernon Water Company, holding 1,855 shares of stock, voted in favor of consolidation, and the holders of the stock then issued of the New York City Suburban Water Company in like manner voted in favor of consolidation. A large majority of the stock of the New York and Mount Vernon Water Company voting for consolidation was in the name of Smith, but in fact it was owned by Coffin & Stanton, a firm of bankers who controlled the enterprise. On the 10th day of June, 1892, the required certificate was executed and filed, and the two companies became consolidated. The

holders of the 1,855 shares of stock of the New York and Mount Vernon Water Company subsequently exchanged such stock for the stock of the consolidated company. Huss did not exchange his stock, nor within the twenty days given him by statute (Laws of 1890, chap. 567, § 14) object to the consolidation or demand payment for his stock. After the consolidation the new company assumed control of the property of both companies and conducted the business for which it was incorporated. Of the \$1,500,000 of bonds, authorized and secured by the mortgage to the Atlantic Trust Company, \$400,000 were to be used in retirement of the bonds of the New York and Mount Vernon Water Company and \$900,000 for extending and improving the plant. This provision was inserted in the mortgage. Thereafter bonds, amounting in the aggregate to \$195,000, were issued and exchanged for the bonds of the New York and Mount Vernon Water Company, secured by its third mortgage to the Central Trust Company of New York, leaving five bonds of \$1,000 each outstanding and secured by this mortgage. All of the bonds were issued by the Atlantic Trust Company in compliance with the essential requirements of the mortgage. Four hundred and ninety-five thousand dollars of the bonds appear to have been issued before consolidation of the corporations was effected, but after the agreement of consolidation was executed, and the remainder after consolidation. The whole amount issued was \$1,270,000. They were all issued upon the order of the president of the New York City Suburban Water Company and delivered to Coffin & Stanton. What disposition was made of the bonds by Coffin & Stanton, aside from those used to retire the bonds of the New York and Mount Vernon Water Company, and to improve and extend its works, does not clearly appear. At the time of the failure of the firm of Coffin & Stanton they were the holders of \$650,000 of the bonds which were hypothecated as collateral security for money owing to the firm. The remainder of the bonds are held by various persons, corporations and banks in the United States and England. When Coffin & Stanton failed Newman Erb was appointed receiver of the estate and entered upon his duties. Default having been made in payment of interest upon the bonds Erb, in pursuance of a provision contained in the mortgage, requested the Atlantic Trust Company to foreclose



the same. Thereupon a foreclosure action was instituted, and in the usual course was carried to a judgment of foreclosure and sale. Pending this foreclosure the holders of bonds, in an amount exceeding \$1,000,000, deposited the same with the Atlantic Trust Company, and a committee of such bondholders was appointed, who executed and delivered a trust agreement providing for the protection of the rights of the bondholders and the reorganization of the company. By the terms of the judgment of foreclosure and sale the bonds and overdue coupons were authorized to be received in payment of the purchase-price of the property as equivalent to so much of the purchase money as would be distributable and payable thereon. Acting under the trust agreement and the authority of the judgment the property was bid in by Newman Erb and Charles Bard, a committee representing the committee created by the trust agreement, for \$50,000; thereafter, in pursuance of the same authority, Erb and Bard and their associates incorporated themselves under the name of the New York Suburban Water Company. The certificate of incorporation provided, *inter alia*, that there should be paid upon the bonds to be issued by the new company two and one-half per cent per annum for the first five years, and an additional two and one-half per cent, or so much as should be earned, and at the end of five years interest at the full rate of five per cent per annum; that the bondholders should receive of the securities of the new company for each \$1,000 bond a new first mortgage bond, par value of \$800, and ten shares of full-paid common stock, \$1,000; that as negotiations were then pending for a sale of the property, and in the event that a sale was not effected during the period the bondholders were compelled to suffer an abatement of a part of the interest upon the new bonds, the stock was to be held in trust and deposited with the Atlantic Trust Company for a period not to exceed five years, and certificates of beneficial interests were to be issued to the bondholders in lieu thereof, the stock so held to be used to elect the board of directors from among the bondholders, the trust created to leave the committee with power to dispose of the entire stock, subject to the approval of the owners of three-fourths in amount of the certificates of beneficial interest. After the company was organized it took possession of the property, carried on the business, and on June 10, 1895, executed to the Atlantic

Trust Company, as trustee, a mortgage upon its property to secure \$1,500,000 of its bonds pursuant to the provisions of the agreement of reorganization. Of these bonds \$1,010,500 have been issued to the holders of the bonds of the New York City Suburban Water Company, who deposited their bonds under the agreement; \$130,000 have been issued for cash and \$39,500 have been delivered to the president of the company for its use. These bonds are now held by various parties and are widely scattered. The property purchased at the foreclosure has been conveyed to the new corporation. The original incorporators of the New York City Suburban Water Company were all employees of Coffin & Stanton, as clerks or otherwise, except Gleason, who was the counsel for the firm, and conducted the proceedings resulting in the incorporation of this company and the consolidation, as hereinabove stated. Ludwig, the president of the first Suburban Company signed all of the bonds, and made requisition of bonds in the aggregate of \$495,000, which were delivered to Coffin & Stanton before consolidation was effected. The president of the consolidated company was Clarence D. Turney, the manager of Coffin & Stanton, and it was upon his requisition that the remainder of the bonds issued were received from the trust company and delivered to the firm of Coffin & Stanton. The plan of consolidation originated with Coffin & Stanton, and was carried out at their instigation. They used some of the stock and bonds for their private purposes and as a reinforcement of security for loans, but how many went in this direction the record does not disclose. Newman Erb occupied for a time an office with Coffin & Stanton, and did some business for them. By his declarations it appeared that he was more or less familiar with the operations of Coffin & Stanton, and to some extent with their operations in connection with the water companies.

In the action of foreclosure and sale by the Atlantic Trust Company Turney filed an answer, in which he admitted the allegations of the complaint, and upon this admission the subsequent applications to the court were made. Upwards of a year after the foreclosure and sale of the mortgaged property, Huss assigned his interest to the plaintiff, as hereinbefore stated, and thereafter the plaintiff brought this action.

The complaint demands as relief that the New York Suburban

Water Company be adjudged to hold the property in trust for the discharge of valid liens of the New York and Mount Vernon Water Company to be ascertained; that it be adjudged that the mortgage or deed of trust is not a valid lien upon the property, or any of it; that the judgment of foreclosure and sale and the reorganization proceedings be vacated and set aside; that the proceedings of consolidation are null and void, and that the property of the New York and Mount Vernon Water Company was not affected thereby; that the stock held by the receiver of the New York City Suburban Water Company and the bonds issued to Coffin & Stanton, or any substituted stock or bonds, are null and void, and for such further relief as may be just. Upon the complaint and the proof the court rendered a judgment, adjudging, among other things, that the plaintiff is entitled to recover his proportionate share of the proceeds of the property of the defendant the New York and Mount Vernon Water Company as upon its dissolution on June 17, 1892; and it directs that the property as described be sold, subject only to the lien of the first mortgage for \$200,000, and of the second mortgage for \$5,000; and that the property be free of any lien by virtue of the mortgage executed by the New York City Suburban Water Company, or the judgment of foreclosure obtained by the Atlantic Trust Company thereunder, or of the mortgage executed by the reorganized company; that none of the parties to this action are entitled to share in the proceeds of the sale, except the plaintiff; that the property be sold at public auction for cash, subject only to the aforesaid liens; that the referee named pay to the plaintiff ten one hundred and forty-fifths of the net proceeds of the sale and costs of the action, and that he hold the balance for further disposition as shall be provided upon the foot of the judgment; that the plaintiff have leave to bring in the owners of 135 shares of the capital stock of the defendant the New York and Mount Vernon Water Company, not owned or held by parties to this action, that their interest and share in the proceeds may be determined.

*A. J. Dittenhoefer* [*I. M. Dittenhoefer* with him on the brief], for the appellant, the New York Suburban Water Company.

*J. Langdon Ward*, for the appellant, the Atlantic Trust Company.

*Roger M. Sherman*, for the respondent.

HATCH, J. :

The judgment rendered in this action proceeds upon the theory that the issue of stock of the New York and Mount Vernon Water Company in fulfillment of the construction contract was in fraud of the rights of the stockholders of that company, in consequence of which such stock, so far as it participated in the vote for consolidation, is void as against the plaintiff in this action, and others similarly situated ; that the creation of the New York City Suburban Water Company and the subsequent consolidation were in pursuance of a fraudulent scheme to obtain control of the property of the New York and Mount Vernon Water Company for little outlay in money, and subject it to the lien of a mortgage largely in excess of the value of the property, by reason of which fraud the whole transaction was vitiated, and that neither the parties who conceived the scheme nor the persons who thereafter became possessed of the stock and bonds of the consolidated company, by purchase, for value or otherwise, acquired any rights which entitle them to consideration in the judgment. It is quite evident that the judgment rendered is radical and sweeping in its character and effect. It sharply sets the time where the fraud began, and in the determination of property rights leaves no doubt upon which side stand the sheep and upon which side stand the goats.

As the questions to be determined are important and vitally affect the property rights of a large number of persons who are wholly cut off if the judgment is to stand, we have given it careful attention, and extended the discussion beyond ordinary limits. Is it true that the stock issued in payment for construction, which participated in the vote for consolidation, is void? There is no dispute of fact in connection with this matter. Inman Bros. appear to have fulfilled their contract to the letter. They constructed the works which they contracted to construct, and the company and the village of Mount Vernon accepted the same, and entered into the enjoyment of the property, and it and its successors have been in the enjoyment of the property since. This judgment wipes out the consideration in part which was paid for that work, and it sustains, in the hands of the plaintiff, a part of the same consideration which it wipes out when found in the hands of other parties. There can be no question but that the New York and Mount Vernon Water Com-

pany was competent to contract for the construction and extension of its plant, and to pay therefor in its stock and bonds. The statute under which it was created authorized it so to do. It was required to construct its works under the franchise granted by the village of Mount Vernon. Inman Bros. were under no legal disability to enter into such contract. There was no creditor in existence to complain or to charge that the property of the corporation was improvidently or fraudulently misapplied. There was no stockholder who could be wronged. The whole issue of stock was held by four persons. Inman Bros. had 1,997 shares; Smith and L'Huilier were respectively the president and secretary of the company, and held two of the three other shares. They executed the contract upon the part of the company with Inman Bros. They attested the certificate which represented the shares delivered to Inman Bros. Holt, who held the other share, interposed no objection, and does not now complain. His firm immediately bought from Inman Bros. a large number of the bonds, and received a large block of the stock, for which bonds and stock it paid cash. These were all the persons interested in the transaction. The company contracted, it obtained that for which it contracted, and no person or corporation then in existence, or which subsequently came into existence as an interested party, can be heard in complaint of a transaction by which no person was defrauded, and each obtained what it contracted to obtain. The legal principle is well settled which sustains such a transaction. (*Woodruff v. Erie Railway Co.*, 93 N. Y. 609.) But, farther, the company received the benefits of the contract in the added value to its plant, and they and their successors have enjoyed it since. The plaintiff in no wise offers to restore to Inman Bros., or their successors in interest, the value which they gave for the stock. It was expressly said by Judge FINCH, in speaking of a case involving this principle, "That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this State." (*Seymour v. S. F. C. Assn.*, 144 N. Y. 341; *Pocantico Water Works v. Low*, 20 Misc. Rep. 484.) The last case is quite similar to the one we are presently discussing, and supplies all that is needful by way of discussion and reasoning upon this branch of the case. The judgment herein saves from condemnation 145 shares of stock,

although all of such shares, except possibly three, came from the same source as the outlawed shares, and even these may not be saved if they are "owned or held by parties to this action" other than the plaintiff. It is somewhat difficult to grasp how the 145 shares purged themselves from the taint of fraud which attached to the whole. By the vote of 1,855 shares for consolidation, a consummation clearly lawful in itself, the penalty of death has been inflicted, while the 145 shares have become regenerated and arise from a new birth. We know of no legal principle from which such a result can be deduced. It is claimed by the plaintiff and found by the court that Huss rendered service to the company, and that the company issued the stock to him for such service. Such finding and claim are without support in the evidence. The ten shares of stock were transferred by Crow to Huss, and Crow received his shares from those issued to Inman Bros. by transfer from them. Huss testified that the service which he rendered was during the construction of the works. "Both Mr. Crow and Mr. Inman asked me to get these things for them if I could, for the use of the company. It was their business to acquire water rights for the company. I supposed they were under contract to do such for the company." It is true that he speaks of being requested by Smith to perform service when he was president. But such statement does not change the fact that the work which he did was of a character which Inman Bros. were to perform under the contract. He knew such was the fact, rendered the service and received the pay from the stock which passed through them. Huss, therefore, stood upon no other or different footing than the other holders. His transferee could acquire no other rights than he held. (Cook Stock & Stockh. § 40, and cases cited in note.) If the stock issued to Inman Bros. was invalid, then it follows that the stock issued to Huss was also invalid and could not be made to furnish a basis for this action. We think, however, that this stock was valid at the time of its issue, and in its entirety it remains untainted with any vice. We must assume that the steps taken to effect the consolidation were in all respects valid and in accordance with law. This has been so decided in the action brought by Cameron and Huss to restrain the consolidation. (*Cameron v. N. Y. & M. V. W. Co.*, 133 N. Y. 336.) This judgment was not

pleaded in bar of the present action, and, consequently, it was not admissible in evidence as constituting a bar. It was, however, admissible as evidence, and as evidence it is conclusive as an adjudication of the same facts if in issue between the parties. (*Krekelen v. Ritter*, 62 N. Y. 372.) It appears from the complaint in that action that, among its causes of action, was the claim that the trustees of the New York and Mount Vernon Water Company had caused to be organized the New York City Suburban Water Company, with a nominal capital of \$1,500,000; that the latter company had no assets and was formed for the purpose of absorbing the other two companies. It further set up the making of a mortgage to the Atlantic Trust Company, and that it was proposed to make this mortgage a lien upon the property of the New York and Mount Vernon Water Company in pursuance of the agreement of consolidation which it was averred was made. The judgment entered in that action is, therefore, conclusive as evidence so far as the present complaint seeks to make available these acts upon the part of the consolidating companies as a ground of defeating the valid existence of the Suburban Company, the right to consolidate, and the effect of such consolidation. (*Williamsburgh Savings Bank v. Town of Solon*, 136 N. Y. 465; *House v. Lockwood*, 137 id. 259.) Upon these questions the plaintiffs in that action contended for the same things in this respect that the plaintiff does in the present action, and upon these questions we think he is concluded by the former judgment, as he is a privy in interest with Huss. But aside from the question of the conclusiveness of this record upon this subject as a technical rule, we regard the decision in that case, embracing as it necessarily did the validity of the vote to consolidate, and the agreement of consolidation, as conclusive of the questions. The agreement of consolidation was before the court in that case, and the facts set out in the affidavits embraced all the matters and things leading up to the execution of that agreement. The court must have considered those questions in reaching the conclusion at which it arrived, as they were in the case and urged in the brief of counsel. Huss was fully aware of all the proceedings; he was served with a copy of the agreement of consolidation and notice of meeting of the stockholders to vote thereon. After the adjudication which dismissed his complaint in

the former action, he took no part in the consummation of consolidation, interposed no objection thereto and gave no sign either of approval or disapproval, but he and his assignor slept upon whatever rights they possessed for five years after consolidation was effected, and for ten years after the issue of the stock to the Inmans. It became the duty of Huss, if he desired to assert any right, to act promptly, and, failing so to do, he became bound by acquiescence therein, and is estopped from asserting any right as against any person who has, in good faith, dealt with the corporation and received its securities. (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; 2 Morawetz Corp. § 630.) And this is the rule, even though there be affirmative fraud in the transaction, where such fraud is known or is subsequently ascertained and no steps are taken either to arrest or correct it. (*Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263.) No public interest was affected by this transaction. It is purely private in its character, extent and injury, and, therefore, consent, acquiescence or *laches* can validate the act. In these questions was also involved the validity of the 1,855 shares of stock which voted for consolidation. There has never been any pretense but that Coffin & Stanton became possessed of these shares in a lawful manner by purchase, and thereby acquired the right to vote upon them, either in their own name or in the name of their transferee. Huss was as well acquainted with all of these facts at that time as he was at any subsequent time. It, therefore, follows that, so far as the proceedings which led up to the consolidation of these companies are concerned, there is no basis in law upon which they may now be interfered with, and the persons who acquired rights thereunder must be held to be protected in such rights as they acquired.

There exists strong ground for saying that the mortgage held by the Atlantic Trust Company became a lien upon all of the property held by the consolidated company. But we do not find it necessary in this action to determine or discuss this question. It is sufficient now to say that, whether such mortgage be valid or invalid, persons who have parted with their money or property upon the strength of it as a security are entitled to protection, and that the company and its stockholders are estopped from asserting its invalidity. (*Carpenter*



v. *Black Hawk Gold Mining Co.*, 65 N. Y. 43.) It is evident that some of the bonds were issued for cash which the company received. It is certain that the payment of \$195,000 upon the third mortgage of the New York and Mount Vernon Water Company arose out of the proceeds of the bonds, and the same is true so far as money was placed in the company to construct and extend its works, and pay the floating debts which had existence when the consolidation took effect. Money advanced for these purposes upon the faith of negotiable instruments issued by the company became debts of the company, whether the holder could look to any particular security for their payment or not. In view of this rule it is to be borne in mind that this action is brought by a stockholder seeking to enforce his right in the property of the company. But his rights, in this respect, are subordinate to the rights of the creditors of the company. We may assume that the mortgage to the Atlantic Trust Company was invalid; that its foreclosure was collusive and fraudulent; that the committee of reorganization had notice of all the facts, and that the reorganized company is honeycombed with fraud. But all this does not wipe out the fact that the New York City Suburban Water Company still exists as a corporation, and that it has creditors, and that those creditors who have taken its securities in good faith are entitled to be paid. No stockholder can institute his action and secure to himself a proportionate share of the property of the corporation, represented by his stock, without regard to the rights of creditors and in preference thereto. The court will not grant relief to such stockholder by ordering a sale of the whole property of the corporation, and distribute the proceeds among its stockholders without any provision for paying creditors. Sequestration of the property of corporations may not be had under such a proceeding and in such an action. It is opposed to the settled policy of the State in distributing the property of corporations. (Code Civ. Proc. § 1784 *et seq.*) This judgment makes no provision for any creditor except such as are secured by mortgage, and wipes out bonds and other obligations to the extent of nearly \$1,500,000. It distributes the property of a corporation among a certain named class of stockholders. It gives to no creditor, aside from those parties to this action, an opportunity to be heard or prove his claim, and

places beyond his reach the property which is his security. Whatever be the rights of the plaintiff under the action which he has brought, we may safely say that they do not embrace the judgment which he has secured, and can never embrace any right which leaves out of view the creditors of either corporation, for if we should treat the New York City Suburban Water Company as non-existent and revive the New York and Mount Vernon Water Company for the purpose of reaching its property, the claim of its technical dissolution by consolidation (a claim which seems to us absolutely inconsistent with the holding that the consolidation was invalid), would not prevent the court from the application of proper rules for the protection of its creditors and others in the distribution of its property. Whatever may have been the frauds of Coffin & Stanton, it would be most unconscionable to permit the stockholders to avail themselves of the property which has been paid for by innocent creditors. Such a course would work a judicial fraud far worse than anything which has heretofore transpired respecting these corporations. In no view can this judgment be sustained.

It should, therefore, be reversed and a new trial granted, with costs to abide the final award of costs.

All concurred.

Judgment reversed and new trial granted, costs to abide the final award of costs.

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THE HARRISBURG PIPE BENDING COMPANY (LIMITED), Appellant,  
v. CHARLES J. WELSH, Respondent.

*Pleading — application for an order of arrest for fraud — the facts constituting the fraud must be stated.*

Upon an application by the plaintiff, in an action to recover for goods sold, for an order of arrest under section 549 of the Code of Civil Procedure, upon the ground that the defendant was guilty of fraud in making the purchase, the facts constituting the alleged fraud must be stated; a complaint is not sufficient which alleges, "on information and belief, that the defendant herein was guilty of a fraud in the purchase of said goods, and in contracting or incurring said

liability, and that he has, since the making of the contract, removed and disposed of his property with intent to defraud his creditors."

*Seemle*, that it requires as good a case on the pleadings to obtain an order of arrest upon the ground of fraud as would be required to justify a vendor in rescinding the contract.

APPEAL by the plaintiff, The Harrisburg Pipe Bending Company (Limited), from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 1st day of November, 1897, vacating and setting aside an order of arrest

*Hector M. Hitchings*, for the appellant.

*Esek Cowen*, for the respondent.

WOODWARD, J. :

The complaint in this action alleges that the defendant purchased certain goods of the Harrisburg Pipe Bending Company (Limited) to the amount of \$742.24, \$100 of which has been paid, and "on information and belief that the defendant herein was guilty of a fraud in the purchase of said goods and in contracting or incurring said liability, and that he has, since the making of the contract, removed and disposed of his property with intent to defraud his creditors." The arrest was made under the provisions of section 549 of the Code of Civil Procedure, and, upon a motion to set aside the order of arrest, the court granted the motion, and in a memorandum says that "the complaint and affidavit on which the order was granted was not sufficient to show any fraud in contracting the debt. In fact no representations were made. The statement of things that occurred afterwards is irrelevant. The complaint does not seem to state a case of fraud at all. The statement of evidence in it is not pleading."

There is no good ground for disturbing this conclusion of the court; it is necessary, to bring the defendant within the provisions of section 549 of the Code of Civil Procedure, that the facts necessary to constitute the fraud be stated. There is not a single fact stated which is calculated to support the charge of fraud in the purchase of the goods, and the material facts in the affidavit on which the order of arrest was granted are met and overcome by the declarations in the affidavit of the defendant in such a manner as to

destroy all presumption of fraud which might grow out of the recital of the plaintiff. "It is not fraudulent *per se* for a person in embarrassed circumstances," say the court in the case of *Pinckney v. Darling* (3 App. Div. 553), "to buy goods, withholding the information from the seller of the actual condition of his business affairs. It seems to be a cardinal factor in cases of this character that there must exist an intent on the part of the purchaser to cheat the seller, or, as said in *Nichols v. Pinner* (18 N. Y. 295), there must exist at least an intention to do an act, the necessary result of which will be to cheat and defraud another. And, as said in the case of *The Phoenix Iron Company v. Hopatcong* (127 N. Y. 206), the fact of insolvency and the failure of a debtor to disclose the condition of his business, unless there is an intent not to pay for what was purchased, does not constitute such fraud as would entitle a creditor to rescind a contract." (See, also, *Morris v. Talcott*, 96 N. Y. 100; *Hotchkin v. Third National Bank*, 127 id. 329.)

There is no evidence of intent on the part of the defendant to defraud the plaintiff of its pay. The letters submitted all show an intention to pay, and no fact is established to show that his representations as to his failure to make such payments are not true. It ought certainly to require as good a case on the pleadings to warrant an arrest as would be required to justify a vendor in rescinding a contract, and in this essential particular the complaint in the case under consideration does not meet the requirements.

The order of the Special Term is affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

JOSEPH PARENTO, Respondent, v. TAYLOR & COMPANY, Appellant.

*Negligence—selection by an employee of an unfit but not structurally defective machine—acceptance of an obvious risk—res ipsa loquitur.*

The selection by an experienced employee, from among several traveling cranes, of one not shown to have been improperly constructed, which, to the knowledge of the employee, had rust and dirt in its parts, and was not oiled, constitutes a clear assumption on his part of an obvious risk.

Where the hand chain attached to a traveling crane fails to work, and the employee engaged in operating it pulls upon the lowering part of the hand chain, whereupon the load comes down suddenly, drawing his hand in between the chain and wheel and injuring it, no presumption arises from the manner in which the accident occurred that it was necessarily caused by the stretching of a link in the chain; the doctrine of *res ipsa loquitur* does not apply to such a case.

APPEAL by the defendant, Taylor & Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 12th day of April, 1897, upon the verdict of a jury for \$500; also from an order entered in said clerk's office on the 12th day of April, 1897, denying the defendant's motion to dismiss the complaint, and also from an order entered in said clerk's office on the 15th day of April, 1897, denying the defendant's motion for a new trial made upon the minutes, except from so much of said last-mentioned order as stays the execution of judgment for thirty days after notice of entry of judgment.

*Herbert C. Smyth*, for the appellant.

*J. Stewart Ross*, for the respondent.

GOODRICH, P. J. :

The action is brought to recover damages for injuries sustained by the plaintiff while in the defendant's employ. The jury rendered a verdict for \$500, and from the judgment entered thereon and the order denying a motion for a new trial the defendant appeals. At the close of the plaintiff's case a motion was made to dismiss the complaint; this motion was denied, and exception taken. The same motion was renewed at the close of the entire case, with the same ruling and exception.

The plaintiff had been in the employ of the defendant for three or four years, and his duty required the moving of heavy iron castings from place to place. These heavy castings were moved by means of cranes running along an overhead structure known as a tramway or traveler. There were several of these cranes, and the plaintiff, shortly before the accident, selected one of them to move a heavy casting weighing some 350 pounds; while moving the casting he received his injury. The crane has two heavy chains, known as hoisting or load chains, running around two pulleys, and also an endless chain, somewhat smaller than the other, running to a separate pulley which is geared on to the main pulley. This lighter or hand chain does not sustain any bearing weight, but is simply used to operate the main pulley; it runs through the upper but not the lower pulley. The heavy load chain moves slowly, and it requires fifty pulls of the hand chain to raise a casting nine inches by means of the load chain.

It appears that the plaintiff had frequently used these cranes, including the one which caused his injury, and was familiar with the method of their operation. On the occasion in question he was using the hand chain to hoist a casting, and had lifted it several inches when it failed to work, whereupon he took hold of the lowering part of the hand chain and pulled upon it. This set free the heavy chain and the load came down suddenly.

The plaintiff testified: "I didn't have a chance to pull my hand away; the weight of it brought my hand into the middle chain, which is attached to the hook, and my fingers were drawn in between that wheel, the lower wheel, \* \* \* and the chain." Three of his fingers were taken off.

It appeared by the testimony of Lynch, another witness for the plaintiff, that this particular crane had worked hard at times. He testified: "I found out why it worked hard. It was not oiled—it was not oiled, and then it ran dry, like there was no oil on it; it would get hot and stick, same as any other piece of machinery."

The original complaint alleged that the accident resulted from the fact that "the chain held by plaintiff (being insecure, insufficient and negligently and improperly used for this purpose) suddenly parted from its position," and that this occasioned injury to the plaintiff.

Some testimony was given tending to show that the accident

occurred from a failure to oil the chain before using, and that it resulted from rust upon the chain, but the complaint was amended at the trial, after both parties had rested, so as to allege that the accident occurred from "the defective condition of said hoisting machine, which said defect consisted in the chain which formed a part of said hoisting machine, having become stretched or out of repair, so that it caught in the sheaves of the pulleys of said hoisting machine and became fast." The following colloquy occurred: "Mr. Smyth: I understand that, as the complaint reads here, we are meeting the complaint that the chain had stretched? The Court: That and that alone. Mr. Ross: Yes, and that that inference can be drawn from the facts. The Court: Yes, but that particular defect of the stretching of the chain, that is the reason the accident happened. Mr. Smyth: Yes, so that they now eliminate rust, want of oil and everything but the stretching of the hand chain. Mr. Ross: Yes, eliminate all that."

There was also positive evidence on behalf of the defendant, which seems to have been uncontradicted, as follows: "By the Court: Q. Was there any stretching of this chain on this machine? A. There could not possibly have been. By the Court: Q. As a matter of fact, you say? A. No, sir, there was not."

The court in its charge said: "No one swears the chain was lengthened, but the plaintiff, without saying he saw the chain was lengthened, asked you to find that, from the happening of the accident in the way it did, the chain must have been out of order in the way his complaint now claims it was, as no other condition would account for the accident. It is for you to say, as a question of fact, whether the defendant was negligent in having in use a machine out of order, and whether plaintiff was free from all neglect." To this no exception was taken.

The question is thus presented whether there was testimony justifying the refusal to dismiss the complaint and the finding of a verdict that the accident resulted from the imperfect condition of the machine. The only defect which is the subject of consideration is that which resulted from the alleged stretching of the chain. There is no evidence that the chain was stretched. It appears affirmatively, with more or less force, that the chain was not stretched, but the plaintiff's counsel, in his brief, says: "It is true

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that there is no direct evidence pointing out a particular defect in the crane, but the evidence of defendant's witness Smith as to the effects of the stretching of a link of the middle chain corresponds so closely, even in details, with what actually occurred, that the inference forces itself upon the mind that a link in the chain of this crane was stretched." This is the ground, if any, upon which the case must rest. This is not one of those cases in which the doctrine *res ipsa loquitur* applies. The accident may have resulted, as the plaintiff's evidence indicates, from rust and failure to oil, or from stretching of the chain, and it cannot be said that the accident resulted necessarily from a stretched chain, even if there was evidence sufficient to establish that fact. In addition to this, there were several cranes which the plaintiff might have used, and he selected the crane with which he attempted to raise the casting.

There is no evidence that the machine was improperly constructed, and the selection by the plaintiff of a crane which had rust and dirt in its parts and was not oiled, instead of one of the other machines which were free from this trouble, and the fact that he noticed this condition, constituted a clear assumption of an obvious risk.

A somewhat similar question was decided at the present term of this court, and the reasoning of the opinion applies to this action. (*Garvey v. New York & Cuba Mail Steamship Co.*, ante, p. 456.)

The refusal to dismiss the complaint was error, for which the judgment and order must be reversed and a new trial granted.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.



JOHN T. ROWLAND, Appellant, v. PHEBE HOBBY, as Administratrix, etc., of DAVID R. HOBBY, Deceased, Respondent.

*Estoppel of a former judgment — that the same issue was involved must be proved by the person who alleges it — the charge of the judge to the jury is competent evidence on that question.*

It is incumbent upon a party setting up the estoppel of a former judgment between the parties to show that the matter, as to which the former judgment is claimed to be an estoppel, was necessarily involved in the rendition of the former judgment.

*It seems*, that the charge of the court to the jury is competent to show the precise issues passed upon by the jury.

APPEAL by the plaintiff, John T. Rowland, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Queens on the 26th day of November, 1897, upon the decision of the court rendered after a trial at the Queens County Special Term dismissing the complaint.

*Charles D. Ridgway*, for the appellant.

*William J. Griffin*, for the respondent.

GOODRICH, P. J. :

The complaint alleges that the plaintiff and David R. Hobby, deceased (of whose personal estate the defendant is administratrix), entered into a copartnership agreement for the building of a sea wall at Hoffman's Island, each party to be equally interested in the profits and losses of the enterprise; that they entered upon the work, and continued it until Hobby's death; that thereafter the plaintiff completed the wall, which resulted in a loss of \$1,780.10. The plaintiff demands judgment for an accounting and payment of one-half of the loss.

The defendant denies knowledge of the copartnership, and sets up as a defense that in a previous action brought by her as administratrix against Rowland, for the collection of a note made by the latter, it was alleged by Rowland as a defense that there was a partnership between the parties; that Rowland had made the note as a method of furnishing his share of capital; that the note was to be paid out of the profits of the enterprise, and not otherwise; that the admin-

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istratrix replied denying these allegations, and that the question of copartnership was at issue; that there was a judgment in favor of Mrs. Hobby; so that it was adjudged that there was no such partnership, and that the judgment is *res judicata* between the parties in the present action.

On the trial of the present action the administratrix offered in evidence the judgment roll, and also the stenographer's minutes of the evidence taken at the former trial; and the plaintiff herein contends that it is conclusively shown by the minutes that the question of partnership, though set up in the answer, was never passed upon by the jury in the former action, and was not litigated in nor essential to the judgment in that action. In this action the court dismissed the complaint, saying: "The judgment in *Hobby, as Administratrix, etc.*, vs. *Rowland* is conclusive upon the main question presented here. In that action defendant, to sustain his defense, sought to establish a copartnership between himself and defendant's decedent. He presented that question and it was litigated; it was a material and essential fact to such defense."

The doctrine of *res judicata* is considered by this court in the case of *McCarthy v. Hiller* (*post*, p. 588), and the court, reviewing the authorities, held that: "It is not sufficient that the action should be between the same parties and in respect to the same property; it must be shown that the particular cause of action has been before the court, and that it was passed upon in arriving at the judgment of the court." The doctrine was also stated that the burden of proof is upon the party who relies upon the estoppel, and he must show that the matter in controversy has been already heard and determined.

I find a good statement of the principle here involved in the case of *House v. Lockwood* (137 N. Y. 259, 268), where the court said: "The general doctrine of *res adjudicata* is well understood. The rule is founded upon convenience and public policy. Issues which the parties have submitted to a court of competent jurisdiction and had determined are put at rest, and are not to be reopened and relitigated, and their adjudication is conclusive in all subsequent controversies between them where the same matter comes again directly in question. But the rule is not always easy of application, and there are qualifications to it which must be carefully noticed. The

rule, with its qualifications, is very well stated in the brief of the learned counsel for the appellant in this action, as follows: 'A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided. But it is final as to every fact litigated and decided therein, having such a relation to the issue that its determination was necessary to the determination of the issue.'"

It appears by the record that on the trial of the former action the partnership was proven without contradictory testimony, but an examination of the testimony in that action shows that there was also evidence that the note was not given in connection with the partnership, but was for money borrowed by Rowland from Hobby, and that after Hobby's death Rowland admitted this fact and promised to pay the note; so that the question of partnership was not necessary and essential to the decision of the issues by the jury. The jury might have found that the note was given in connection with partnership matters, and in that event the verdict would have properly have been for Rowland. There could not properly have been a verdict for Mrs. Hobby unless it was based on a finding that the note was not given as a part of the capital of the copartnership, but was outside of its affairs. In other words, the question of partnership was not necessarily "passed upon in arriving at the judgment of the court," as stated in *McCarthy v. Hiller* (*supra*).

There is abundant authority for this doctrine. *Washington, Alexandria & Georgetown Steam-Packet Co. v. Sickles* (24 How. [U. S.] 333) was an action on two special counts and the general counts in assumpsit. The jury rendered a general verdict, but it did not appear upon which of the counts it was rendered. The court said (p. 345): "The defendants in error contend the jury, by their verdict, necessarily found the statements of fact in all the counts of the declaration to be true; and the effect of a verdict and judgment on the whole declaration and a verdict and judgment on the first count is precisely the same, in producing an estoppel, as respects the matters contained in that special count. But this is not true. If the verdict had been rendered on the special count in exclusion of the others, the record itself would have

shown that the existence and validity of the contract were in question. There would have been no ground for the inquiry whether any other issue was presented to the jury. But, where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than on another of these different issues. (*Henderson v. Kenner*, 1 Rich. R. 474; *Sawyer v. Woodbury*, 7 Gray, 499.)”

The decree was reversed and the cause remanded for further proceedings, which being had, the same cause came up in a subsequent appeal (*sub nomine Packet Company v. Sickles*, 5 Wall. 580), where the court (p. 592) stated: “As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and, further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.”

In *Sawyer v. Woodbury* (7 Gray, 499, 503) the principle was recognized, and it was held “that where the fact in controversy, together with many other questions of fact, are within the issue of the case, in a subsequent case, where such finding is relied on, it is competent for the party offering it to go into evidence *aliunde* to prove that such particular question was actually contested and submitted to the jury, and the verdict was such as to show that they passed upon it.”

Again, in *Russell v. Place* (94 U. S. 606, 608) the same principle was recognized. “It is undoubtedly settled law that a judg-

ment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record — as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered — the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.”

Such a wealth of authority leaves the question no longer open to discussion. As the burden of proof was on the defendant, who set up the estoppel, she was bound, but failed, to prove her allegation that the question of partnership was necessarily involved in and submitted to the jury in the former action, or that it was necessarily passed upon by the jury in arriving at their verdict.

The defendant could have put in evidence the charge of the court in the former action, which might show the precise issues passed upon by the jury; but no such proof appears in the record of this case. It was stated on the argument that such proof was offered and excluded, but of that we can take no notice.

It follows that it was error to dismiss the complaint, and that a new trial must be granted.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NATIONAL STARCH MANUFACTURING COMPANY, Respondent, v. JAMES I. WALDRON and Others, Assessors of the Town of Oyster Bay, Appellants.

*Taxation — when the machinery of a corporation is taxable as "land."*

The rule to be applied in determining whether machinery in use by a corporation upon its own land is real or personal property for the purposes of taxation is as rigid as that which obtains between a vendor and a vendee upon a question of fixtures.

Machinery, consisting in part of machines standing on brick or wooden foundations, fastened with bolts, in part of machines slightly fastened with screws, and in part of shafting, all capable of being removed without material injury to the buildings in which they are, which has been placed in the building by its owner, a manufacturing company, for the purpose of conducting a manufacturing business, to which it is essential, and which has been purchased, together with the premises, by a corporation which conducts a similar business thereon, must be deemed to have been permanently annexed to the land for the purposes of the business, and as such is taxable as "land" within the meaning of that term as defined in the Revised Statutes.

APPEAL by the defendants, James I. Waldron and others, assessors of the town of Oyster Bay, from a final order of the Supreme Court, made at the Queens County Special Term and entered in the office of the clerk of the county of Queens on the 5th day of January, 1898, upon a writ of certiorari reducing the assessment of the relator's real property in the town of Oyster Bay, Queens county, for the year 1897, from \$330,000 to \$200,000.

*George W. Davison*, for the appellants.

*E. T. Payne*, for the respondent.

GOODRICH, P. J. :

The property in question consists of thirty-one acres of land, of the value of \$200,000, and of eleven steam engines, forty-three pumps and other tools, shafting, pulleys, etc., in the relator's building upon said land at Oyster Bay, which are assessed at \$130,000 and owned by the relator, a foreign corporation, having its principal place of business in the city of New York. The assessors assessed the entire property as real estate, fixing the value at \$330,000. It

was stipulated between the parties that the machinery, etc., is taxed as part of the relator's property in the city of New York, and both parties have requested the court to render a decision upon the nature of the relator's machinery, that is, whether it is real or personal property, irrespective of the place where it is now taxed.

The Revised Statutes (9th ed., p. 1676), in the chapter on taxation, contain the following provisions:

"*Land' defined.*—Sec. 2. The term 'land,' as used in this chapter, shall be construed to include the land itself above and under water; all buildings and other articles and structures, substructures and superstructures erected upon, under or above, or affixed to the same."

"*Personal estate.*—Sec. 3. The terms 'personal estate,' and 'personal property,' whenever they occur in this chapter, shall be construed to include all household furniture, monies, goods, chattels.  
\* \* \*"

In another article occurs the following section (p. 1681):

"*Property of corporations.*—Sec. 6. The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be. \* \* \*"

It is evident that the question must turn upon the construction to be given to these provisions of the statute; in other words, whether the machinery, etc., falls within the definition of land or personal estate, and whether or not they are to be regarded as fixtures. The corporation being the owner of the entire property, I think that the rule to be applied between it and the People is to be decided upon principles no less rigid than those which would be applied to a question of fixtures arising between vendor and vendee. The authorities cited below lay down the principle that, in order to determine the character of such property, three tests are to be applied, which may be tersely stated as follows: *First*, relation of annexor to the land; *second*, purpose of annexation; *third*, method of annexation.

In *Potter v. Cromwell* (40 N. Y. 287) a judgment creditor of the

owner of certain premises had issued execution and the premises had been sold by the sheriff to the defendant Cromwell. The owner had previously erected upon the premises certain machinery, including what is known as "Noyes' Portable Grist Mill." After the sale the judgment debtor surrendered possession to the defendant, who with his consent removed the machinery and grist mill and subsequently received the sheriff's deed of the premises. The plaintiff, who was afterwards appointed receiver in supplementary proceedings against the debtor, sued to recover the property which had been removed from the mill, and the court held that the mill was a part of the realty; that where machinery is actually annexed to the land it will be presumed to have been so attached with a view to the permanent improvement, or beneficial enjoyment, of the freehold, and will be deemed a fixture, in the absence of proof that the attachment was merely for the purpose of steadying and adjusting the machine; or that the intention at the time existed, not afterwards abandoned, that the annexation should not be permanent in character; or that there is some agreement or relation of parties, inconsistent with the supposition that a permanent annexation was intended, and that in determining whether a particular article is or is not a fixture, the intention of the party who attached it is an important element to be considered. The court refers to the case of *Teaff v. Hewitt* (1 McCook [Ohio], 511), in which the three elements of the test above enumerated were stated, and fully adopts the views of the Ohio court in that respect.

Again, in *Voorhees v. McGinnis* (48 N. Y. 278, 282) the court cited and restated the doctrine of its former decisions, using the following language:

"There are several tests, in the form of general principles, that will aid in the determination of the present question.

"1. The rule is quite uniform that to give to articles, personal in their nature, the character of real estate, the annexation must be of a permanent character. There are exceptions to this rule, in those articles which are not themselves annexed but are deemed to be of the freehold from their use and character, such as mill stones, fences, statuary and the like. (*Potter v. Cromwell*, 40 N. Y. R., 287; *Capen v. Peckham*, 35 Conn. R., 88.)



"2. A second test, but not so certain in its character, is that of adaptability to the use of the freehold. (*Voorhis v. Freeman*, 2 Watts & S., 116; *Pyle v. Pennock*, Id. 390.)

"3. A third test is that of the intention of the parties at the time of making the annexation. (*Potter v. Cromwell*, *supra*; *Murdock v. Gifford*, 18 N. Y., 28; *Winslow v. Merchants' Ins. Co.*, 4 Mete., 306; *Swift v. Thompson*, 9 Conn. R., 63; *Capen v. Peckham*, 35 Conn. R., 88.)

"The circumstance that the machinery may or may not be removed without great injury to building or to itself, is not now deemed to be controlling. In *Potter v. Cromwell* (*supra*) the tests are declared to be, *first*, actual annexation; *second*, the use or purpose of the application of the machinery; *third*, the intention to make the annexation a permanent accession to the freehold."

In *McRea v. Central Nat. Bank of Troy* (66 N. Y. 489) the court approved the doctrine of *Potter v. Cromwell*, and held that the criterion of a fixture is the union of three requisites: *First*, actual annexation to the realty or something appurtenant thereto; *second*, application to the use or purpose to which this part of the realty with which it is connected is appropriated; *third*, the intention of the party making annexation to make a permanent accession to the freehold.

Washburn, in his treatise on Real Property (Vol. 1, p. 24, 5th ed.), states the rule as to fixtures as follows: "If the owner of lands provides anything of a permanent nature fitted for and actually applied to use upon the premises by annexing the same, it becomes a part of the realty and passes to the purchaser, though it might be removed without injury to the premises."

In Gerard on Titles to Real Estate (p. 520) it is said: "As a general rule, whatsoever is affixed to or on, or essential to the beneficial use of the land, passes with the land, although this rule has been modified at times to suit the customs of different localities or trades."

In the case at bar, the relation of the annexor to the land being that of owner, it had the entire control of both species of property. It is conceded by stipulation that the "machinery was placed in the factory building for the purpose of carrying on relator's manufacturing business," which is indicated by the title to be that of manu-

facturing starch. The machinery is essential to the business, and without it the latter could not be conducted on the premises. It is not hard to infer, indeed the conclusion cannot be avoided, that the machinery was annexed with the idea of permanency, only limited by the cessation of the business of manufacturing starch on the premises, or the substitution of other machinery.

Mr. Grinn, the superintendent of the relator, applied to the assessors on behalf of the company "to reduce the valuation of the company's real estate as set down in the assessment roll for the present year to the sum of \$200,000." He appeared before the assessors, was examined and testified as follows:

"Q. What reduction do you ask in the valuation of said real estate? A. One hundred and thirty thousand dollars. Q. On what grounds do you ask it? A. On the ground that its value as now set down in the assessment roll is grossly over-estimated. That its value is not above \$200,000. Q. When did you acquire it? A. It was acquired by the company in connection with business, good-will and personal property connected with the business in 1890. Q. How (by purchase, inheritance, etc.)? A. By purchase in the manner stated. Q. If by purchase, when did you buy it? A. In the year 1890. Q. What did you pay for it? A. It is impossible to say. The good will of the Glen Cove Mfg. Co., its patents, real and personal estate were taken in a lump, and stocks and bonds for a large part of the price issued in payment. Q. What improvements have been made upon it, and at what outlay? A. Ordinary repairs and betterments of no particular value."

It would appear by this evidence that the machinery was placed in the building by the relator's predecessors in title, as the former company, was engaged in a similar business of manufacturing, and that the company transferred the whole property to the relator; and it may be assumed that the intention of the annexor, whether the old or the new company, was the same, namely, to carry on the manufacturing business. Indeed, as the relator purchased the premises, including the machinery, from the former company for business purposes, added force is given to the presumption that the machinery was intended to be permanently located. These facts imply permanency, and, therefore, the purpose of the annexor must be deemed to have been that of a permanent addition for the operation of its business, and within

the doctrine of *Potter v. Cromwell*, in the absence of all evidence to the contrary, it "will be presumed to have been so attached with a view to the permanent improvement or beneficial enjoyment of the freehold, and will be deemed a fixture."

The method of annexation does not, therefore, seem to be of great importance. The evidence is that some of the machines were on brick or wooden foundations, fastened with bolts; some of them were lightly fastened with screws; some consisted of shafting and could all be removed without material injury to the buildings. But it was held in *Voorhees v. McGinnis* (*ante*), that these facts are "not now deemed to be controlling."

Our conclusion is that, for the purpose of assessment, the machinery has become a fixture and a part of the realty, and it follows that the order of the Special Term must be reversed, with ten dollars costs and disbursements, and determination of assessors confirmed, with ten dollars costs.

All concurred.

Order of the Special Term reversed, with ten dollars costs and disbursements, and determination of assessors confirmed, with ten dollars costs.

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BUSHWICK SAVINGS BANK, Plaintiff, v. CAROLINE TRAUM and Others, Defendants; ANNIE M. STEURWALD, Appellant; BERNHARD B. ZIPPERT, Individually and as Assignee, etc., of CAROLINE TRAUM and ROSA HERMANN and CÉSAR HESS, as Executors, etc., of HENRY HERMANN, Deceased, Respondents.

*Mortgage foreclosure — the costs are a necessary incident to the mortgage lien — they are enforceable out of surplus moneys in the same manner as the debt itself.*

Costs awarded to a junior mortgagee in an action brought by her for the foreclosure of her mortgage, which action, by reason of the interposition of the defense of usury by the mortgagor, is not determined until after a sale of the mortgaged premises has taken place under a foreclosure of the senior mortgage, are a natural and necessary incident to the mortgage lien itself, and are payable, together with the amount due upon such second mortgage, out of the surplus moneys arising from such sale under the foreclosure of the first mortgage.

APPEAL by the defendant, Annie M. Steuerwald, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 29th day of January, 1898, modifying the report of a referee in surplus-money proceedings, and directing a distribution of the surplus moneys in this action.

*J. Stewart Ross*, for the appellant.

*William L. Mathot*, for the respondents.

WILLARD BARTLETT, J. :

This suit was brought to foreclose a mortgage made to the Bushwick Savings Bank in 1890. The appellant, Annie M. Steuerwald, is the owner of a subsequent mortgage, made in 1893. The property was again mortgaged in 1895 to Henry Herrmann, whose executors are the respondents on the present appeal. In March, 1897, Annie M. Steuerwald commenced an action in the County Court of Kings county to foreclose her mortgage. The mortgagor interposed a defense in that suit, setting up usury, but the plaintiff therein prevailed, obtaining a judgment of foreclosure and sale on November 9, 1897. Meantime, however, the Bushwick Savings Bank, in June, 1897, had begun the present suit to foreclose its first mortgage, and had prosecuted the same to a decree and sale, so that, before Annie M. Steuerwald obtained judgment on her second mortgage, the property had been sold under the judgment foreclosing the prior mortgage of the Bushwick Savings Bank, and a surplus had been realized which stood in place of the land, so far as the lien of her second mortgage was concerned.

The lien of this Steuerwald mortgage, principal and interest, has been duly recognized in the order of its priority, in the surplus-money proceedings; but the referee and the court at Special Term have declined to allow to Annie M. Steuerwald, as a part of such lien, the costs awarded to her in the County Court, by the judgment in her suit to foreclose that mortgage. "The costs and allowances in the Steuerwald action," says the learned judge below, "were not a lien against the land, nor are the same a lien against the surplus moneys."

We entertain a different opinion. We think that the costs of the foreclosure suit in the County Court are to be regarded, under the

circumstances, as such a natural and necessary incident to the mortgage lien itself, and to the enforcement thereof, as to constitute them, when fixed and awarded, a part of the amount secured by the lien; or, in other words, that the mortgage is a lien upon the land, or upon the surplus moneys which represent the land, not only for the principal sum secured by the mortgage, together with interest at the stipulated rate, but also for any costs that may be allowed to the mortgagee in a suit to foreclose the mortgage, even though the judgment in that suit may not be obtained until after a sale under a prior mortgage.

It has been held that an action is maintainable to foreclose a junior mortgage, notwithstanding that a judgment of foreclosure has already been rendered in an action upon a prior mortgage. (*Bache v. Purcell*, 6 Hun, 518.) If a sale is made under the first decree, the court may control the proceedings in the suit on the second mortgage, "so far as to restrict the rights of the plaintiff to a participation in any surplus which may result upon such sale; or, if no surplus result, to take their judgment upon the bond given by the mortgagor, as described in the complaint." It seems quite proper to allow the suit upon the junior mortgage to proceed to judgment, notwithstanding that there has been a sale under the first decree, with a resulting surplus, in order to establish the interest of the junior mortgagee in such surplus, where his right to share in it is denied by a plea of usury interposed in his action. The allowance of costs in that case rests in the discretion of the court, and if costs are awarded they are directed by the decree to be paid out of the proceeds of the sale of the mortgaged premises. For the purposes of the judgment foreclosing the second mortgage, the surplus occupies the place of the land, and the costs are to be taken out of those proceeds with the amount due on the mortgage.

In the case of *Crocker v. Lewis* (144 N. Y. 140) it was held that surplus moneys were not chargeable with a judgment for costs awarded to one of the claimants, in a suit against the mortgagor to restrain him from erecting apartment houses upon the land, although the notice of *lis pendens* in that suit was filed before the execution of the mortgage, the foreclosure of which gave rise to the surplus. This was on the ground, however, that the judgment in question, although it gave the claimant certain rights or easements in the

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property, did not charge the costs upon the land, but merely gave the claimant a judgment for them against the mortgagor personally. As already pointed out, the ordinary decree in foreclosure always does charge the costs upon the mortgaged premises, as did the decree in the appellant's suit in the County Court suit, here under consideration.

The order appealed from should be modified so as to establish the appellant's lien for her costs.

All concurred.

Order modified by directing that the costs recovered by the appellant in the judgment of foreclosure in the County Court be paid out of the surplus money as part of her mortgage lien, with ten dollars costs and disbursements to appellant.

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LEOPOLD PFEFFER, as Administrator, etc., of GEORGE B. PFEFFER,  
Deceased, Appellant, v. JOSEPH STEIN and WILLIAM H. GESSWEIN,  
Respondents.

*Negligence — voluntary exposure to danger — subsequent admissions of a foreman not in the course of his employment — failure to object to incompetent evidence — violation of the Factory Act.*

On the trial of an action brought to recover damages resulting from the death of the plaintiff's intestate, who was employed to sort corks in a bicycle factory and was injured by being caught in shafting on which he had volunteered to shift a belt which he had reached by mounting upon a ladder, the foreman of the bicycle factory was asked whether he had not told the mother of the deceased "that he would not have told the boy to go up the ladder if he had thought he would be hurt," which he denied. Subsequently the mother and two other witnesses testified that he did make the statement. There was no other testimony which tended to show that the foreman gave any direction to the boy to shift the belt.

*Held*, that the testimony of the mother, as an impeachment of the denial of the foreman, was incompetent;

That as the declaration was not made within the scope of the foreman's employment by the defendants, the proprietors of the factory, it was not competent evidence of the principal fact alleged to have been stated by the foreman;

That the fact that no objection was made to the proof did not make it effective to create a liability on the part of the defendants;

That if it should be assumed that the deceased had been employed in violation of the Factory Act the result would not be different.

APPEAL by the plaintiff, Leopold Pfeffer, as administrator, etc., of George B. Pfeffer, deceased, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 28th day of January, 1897, upon the dismissal of the complaint by direction of the court after a trial before the court and a jury.

*Alexander Y. Scott*, for the appellant.

*Horace Graves*, for the respondents.

HATCH, J. :

By this action damages were sought to be recovered on account of the claimed negligence of the defendants in permitting and directing the employment of the deceased in a hazardous undertaking. The court heard the whole of the evidence of both parties, and, at the close of all the proof, directed the verdict. It appears from the undisputed facts that the deceased was employed in and about the defendants' factory, in sorting corks used upon bicycle handles. This was a harmless employment, under which the deceased incurred no danger whatever, nor did it bring him in close proximity to or in contact with any machinery used in and about the factory which was dangerous to either life or limb. While so employed the deceased seems to have procured a ladder, placed it underneath a revolving shaft to shift a belt running upon the shaft, and in so doing he was caught in the shaft and wound around it, receiving injuries from which he subsequently died. The case is destitute of any proof showing that he made the attempt to shift the belt by virtue of any direction given to him by the foreman of the establishment, or by any other adult person employed therein. So far as appears, such act was attempted without the knowledge of the defendants or their foreman, and was purely a voluntary act upon the part of the deceased. There is evidence tending to establish that the attempt was made by reason of a difference between the deceased and the other boys, with whom he was employed, as to whether the deceased had the ability to shift the belt; and it is quite probable that he made the attempt which cost him his life in order to demonstrate to his companions that he was able to do it. The case, therefore, was destitute of proof tending to establish that the

defendants were in anywise responsible for the act which produced the injury, and, therefore, there was no negligence upon their part.

The appellant, however, relies upon certain admissions claimed to have been made by the foreman of the defendants, after the accident, and subsequent to the death of the deceased. The foreman had been asked, during the course of the trial, if he did not tell the mother of the deceased "that he would not have told the boy to go up the ladder if he had thought he would be hurt," and the foreman answered in the negative. Subsequently the mother was called as a witness, and testified that after the funeral the foreman called at her house and stated to her "that if he thought the boy would have been hurt he would not have told him to go up the ladder." The mother was corroborated as to this statement by two other persons who were called as witnesses for the plaintiff.

This testimony was incompetent for any purpose. As before observed, there was no evidence which tended to establish that the foreman gave any direction to the boy to shift the belt; consequently, any interrogation in respect of any declaration which he made subsequent to the transaction was immaterial and irrelevant, and under well-settled rules testimony in impeachment of such statements was inadmissible. This testimony was, therefore, incompetent by way of impeachment. (*Furst v. Second Avenue R. R. Co.*, 72 N. Y. 542.) It was also incompetent and ineffectual as testimony in establishment of the principal fact. The declaration was not made in the scope of any duty or employment of the foreman by the defendants; and he had no authority, incidental or otherwise, to make his declarations binding upon the defendants. The testimony was, therefore, inadmissible for this purpose. (*First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Sherman v. D., L. & W. R. R. Co.*, 106 id. 542.) No objection was interposed to this testimony, but this fact does not avail to establish liability on the part of the defendants. (*Delaney v. Hilton*, 18 J. & S. 341.)

If we assume that the employment was in violation of the Factory Act, it does not have the effect of changing the result.

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.



MARY MCK. ENRIGHT, Respondent, v. THE BROOKLYN HEIGHTS  
RAILROAD COMPANY, Appellant.

*Negligence—application by the defendant to take the testimony of the attending physician of the plaintiff—the court will not anticipate a possible condition on the trial which would make it competent—testimony of the plaintiff's physician as to her declarations concerning the circumstances of the accident.*

Upon an application made by the defendant, in an action brought to recover damages for personal injuries, to take the testimony of the plaintiff's attending physician as to what took place at a consultation between him and another physician relative to the condition of the plaintiff and as to her statements in regard to the circumstances under which the injury was received, the court will not anticipate a condition of the evidence on the trial which will make the physician's testimony competent, especially where the plaintiff stipulates not to call as a witness on the trial the physician with whom the party sought to be examined had the consultation.

*Quare*, whether the incompetency of the attending physician to testify to the statements made by the plaintiff to him at the time that he was attending her, does not extend to statements concerning the manner in which the injury was received.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 24th day of February, 1898, denying the defendant's motion for the issue of a commission to take the testimony of Dr. Peter A. E. Boetzkes in the above-entitled action.

*John L. Wells*, for the appellant.

*Albridge C. Smith*, for the respondent.

PER CURIAM:

This is an application to take the testimony of Dr. Peter A. E. Boetzkes, a physician, upon commission. The action is to recover damages for injuries claimed to have been sustained through the negligence of the defendant. Boetzkes was the attending physician of the plaintiff, and the affidavit states that the defendant desires the physician's testimony in respect of what took place between himself and Dr. McNaughton at the time of the consultation between them respecting the condition of the plaintiff; also in respect to

certain statements made by the plaintiff to this physician concerning the circumstances under which the injury was received and the number of times the physician attended her. It cannot be very material as to the number of times the physician attended the plaintiff, as it is not a subject-matter of much dispute. It is quite clear that the physician may not testify to the statements made by the plaintiff to him at the time he was treating her. It is also quite doubtful if this does not embrace statements concerning how the injury was received.

The court below denied the application on the ground of the physician's incompetency to testify, and we agree with it that the court may not anticipate a condition which would make his testimony competent.

Upon the oral argument defendant's counsel limited his range of inquiry to what transpired at the consultation, and respecting the plaintiff's prior condition, claiming that he was entitled to this much in view of the fact that Dr. McNaughton would be called, and thereby open the door so as to make the witness competent to testify. The plaintiff's counsel, in answer to this, stipulates that he will not call Dr. McNaughton with reference to the only consultation he had with the witness proposed to be examined. It would, therefore, seem as if the case was not sufficient to call for the issuing of a commission to take his testimony.

The order should, therefore, be affirmed, but, in view of the stipulation, without costs.

All concurred.

Order affirmed, without costs, upon plaintiff's filing the stipulation mentioned in memorandum *per curiam*.

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THOMAS DEVOY and PETER T. DEVOY, Appellants, v. NEW YORK  
CUT FLOWER COMPANY, Respondent.

*Breach of contract — failure to pay as agreed — excuse must be shown therefor.*

Where a dealer in flowers has not, during a period of five weeks, paid, in accordance with the terms of his contract, for flowers delivered to him, in any one of such weeks, but has in each case been several days behindhand in his payments,

and when payment has been demanded has refused to make it, it is improper, in an action brought against such dealer by the vendor of the flowers, to recover damages as for a breach of the contract by the dealer, in the absence of some good excuse furnished by him for such defaults on his part, to dismiss the complaint.

*It seems*, that, if excuse be given, a question of fact is presented.

APPEAL by the plaintiffs, Thomas Devoy and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Dutchess on the 4th day of May, 1897, upon an order made at the Dutchess Trial Term dismissing the complaint.

The action was brought to recover damages for the breach by the defendant of a contract whereby the plaintiffs agreed to consign to the defendant for sale the products of their greenhouses for the term of one year, and also to recover a sum deposited with the defendant as security for the plaintiffs' performance of the contract.

*Frank B. Lown*, for the appellants.

*Alfred A. Gardner* [*William J. Kelly* with him on the brief], for the respondent.

CULLEN, J. :

I think the evidence on the part of the plaintiffs was sufficient, in the absence of explanation by the defendant, to require the submission of the case to the jury. The contract obligated the defendant to pay to the plaintiffs, at the end of each week, the amount due for the flowers consigned by them during the week previous. The defendant did not comply with this provision in the case of any week's sale during the period of five weeks for which the contract was performed, but was always several days behindhand in its payments. In *Wharton & Co. v. Winch* (140 N. Y. 287) it is said: "It is undoubtedly true that the defendant's failure to pay the installment was such a breach of the contract as absolved the plaintiff from all obligation to further perform, on his part, while the default continued. Nor was he bound to grant the defendant any indulgence, and wait for any period of time, in order to enable him to make good his broken promise. In that sense punctual payment was a condition precedent. The obligation of the plaintiff to proceed under the contract depended upon it. If it was not ful-

filled, one of two courses was open to the plaintiff. He might at once rescind the contract and refuse to go on." (See, also, *Moore v. Taylor*, 42 Hun, 45.) We do not mean to say that every default or delay in payment, resulting from inadvertence, inability to make up accounts or some cause of that character, would relieve the plaintiffs from the obligation of their contract. "The right of a party to enforce a contract will not be forfeited or lost by reason of technical, inadvertent or unimportant omissions or defects. \* \* \* There must be no willful or intentional departure, and the defects of performance must not pervade the whole, or be so essential as substantially to defeat the object which the parties intended to accomplish. Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact." (*Miller v. Benjamin*, 60 N. Y. St. Repr. 295.)

On the occasion when the plaintiffs terminated the contract, they demanded the payment then due them. This was refused. It was incumbent on the defendant to show an excuse for such refusal, and the sufficiency of the excuse was for the jury.

I am also of opinion that the evidence as to the grade and price allowed for the plaintiffs' flowers was sufficient, in the absence of explanation, to warrant the inference that the plaintiffs had not been fairly treated, or the contract carried out by the defendant. I can see that an explanation might be made by the defendant so clear as to justify the court in disposing of this issue, but, in the absence of explanation, the question was for the jury.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITIZENS' ELECTRIC ILLUMINATING COMPANY OF BROOKLYN, Appellant, v. BARZILLAI G. NEFF and Others, Constituting the Board of Assessors of the City of Brooklyn, Respondents.

*Taxation of a corporation — a deduction of ten per cent of its capital stock depends on its surplus equalling that sum — failure to prove the source of a surplus — an objection not taken before the assessors is not available at Special Term.*

Under the Tax Law (Laws of 1896, chap. 908, §§ 12, 81) a corporation is entitled to a deduction of ten per cent of the amount of its capital stock only when its surplus profits or reserve fund, as returned for taxation, equal ten per cent of its capital stock.

Assuming that a corporation is not concluded by a statement, made in its return to city assessors, that it has no surplus profits or reserve fund, still it is not entitled to a deduction upon the ground that its surplus exceeds ten per cent of its capital stock, where it appears that the alleged surplus may have resulted from an enhancement of the value of its franchise, which is exempt from taxation. If such surplus proceeds from savings or accumulations from its business, that fact should be affirmatively shown by it.

An objection that a corporation was assessed in the wrong ward, which was not taken before the assessors, is properly disregarded by the Special Term upon the hearing under a writ of certiorari issued to review the assessment.

APPEAL by the relator, The Citizens' Electric Illuminating Company of Brooklyn, from a final order of the Supreme Court, made at the Kings County Special Term, bearing date the 19th day of January, 1898, and entered in the office of the clerk of the county of Kings, reducing the assessment of the capital stock of relator, made on a return to a writ of certiorari issued to the board of assessors of the city of Brooklyn.

*Frank Harvey Field* [*Edward M. Shepard* with him on the brief], for the appellant.

*Almet F. Jenks*, for the respondents.

CULLEN, J.:

The return of the relator to the assessors showed that it had physical, tangible assets amounting to \$381,217.31; that the value of its franchise was \$750,000, its indebtedness \$183,178.91, and that the assessed valuation of its real estate was \$146,701. If we deduct from the amount of the tangible assets the amount of the

relator's indebtedness, and the assessed value of its realty, the balance is \$51,337.40, to which sum the assessment was reduced by the court at Special Term.

The first contention of the relator is that the Special Term should have reduced the assessment on its capital stock by the further sum of \$50,000, that sum being ten per cent of the amount of that stock. I think it too clear for substantial controversy that in the assessment of corporations they are entitled to no general deduction of ten per cent of their capital stock, but that that percentage is only to be deducted from the surplus profits or reserve fund when such surplus is returned for taxation. If any doubt on this question could arise under section 12 of the Tax Law (Laws of 1896, chap. 908) (which I deny) it is entirely removed by section 31. That section provides that in the first column there shall be entered in the assessment rolls under the name of the corporation, "the amount of its capital stock paid in and secured to be paid in; the amount paid by it for real property then owned by it wherever situated; the amount of all surplus profits or reserve funds exceeding ten per centum of their capital, after deducting therefrom," etc. The proper entry in this column is, therefore, the excess of the amount of the surplus profits above ten per cent of the capital if such excess there is; if there is no such excess, then the entry should simply be "none." Where the surplus profits exceed ten per cent, no practical harm results from stating this sum in the ordinary manner; that is, add the items of capital stock and surplus profits, and from such amount deduct the real estate and ten per cent of the capital. But this method is misleading; and, when the surplus profits are less than ten per cent, erroneous. It is this method of computation which has led to the error to be found in the opinion in the case of *The People ex rel. Manhattan Railway Co. v. Barker* (146 N. Y. 304, 315), for in that computation the deduction of ten per cent of capital is greater than the amount of the surplus with which the company is charged. I use the term "error" with the greatest respect to the Court of Appeals, for I do not understand the question before us to have been considered or passed upon by that court. It is easy to see how the error occurred. The assessors made the computation in one manner, the Court of Appeals followed in the same way.

The relator further contends that the statement of its financial condition, returned to the board of assessors, shows that it has a surplus exceeding \$50,000, and, therefore, it is entitled to a deduction for that amount. In that return the relator further stated that it had no surplus profits or reserve fund. Assuming that it is not concluded by that declaration, we are still of opinion that it is not entitled to the deduction. With a capital stock of \$500,000 it has, apart from its franchise, assets amounting to only about \$200,000. Not only, therefore, the question of surplus profits, but even that of impairment of capital, depends on the value to be given to the franchise. Assuming the relator's estimate of its value is correct, the whole of the surplus is represented by the franchise, which is already exempt from taxation. It may be that, so far from any profit having accumulated from the conduct of its business, the whole surplus has arisen from the enhancement of the value of the franchise. If it proceeded from savings or accumulations from the business, it was the duty of the relator to have affirmatively established that fact.

The objection that the relator was assessed in the wrong ward was not taken before the board of assessors. The Special Term was right in disregarding it.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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CHARLES O. BROWN, Respondent, v. THE TRAVELERS' LIFE AND ACCIDENT INSURANCE COMPANY, Appellant.

*Expert employed to investigate in reference to the fall of a building — he may charge fees for attending a coroner's investigation.*

Where the employment by a corporation, insuring contractors against liability to their employees and others arising out of the negligence of such contractors, of an expert to investigate the cause of the fall of a building in the construction of which the contractors were employed, has been proved, the expert is entitled to be compensated by the corporation for attending and testifying at a coroner's investigation of the matter, and for an investigation as to the accident, made by him in order to qualify himself as an expert witness.

APPEAL by the defendant, The Travelers' Life and Accident Insurance Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 3d day of December, 1897, upon the verdict of a jury for \$851.25, and also from an order entered in said clerk's office on the 16th day of December, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Walter Carroll Low*, for the appellant.

*Edward M. Grout*, for the respondent.

WOODWARD, J.:

Charles O. Brown, the plaintiff, brought this action to recover the sum of \$750 for services alleged to have been rendered the defendant at the request of its attorney, Frank V. Johnson, in investigating the causes which led to the collapse of the Ireland building, and in attendance and giving expert testimony at the coroner's investigation of the accident. The Travelers' Life and Accident Insurance Company, the defendant, issued its policy of insurance, undertaking to protect the firm of J. B. & J. M. Cornell, which furnished the structural iron for the Ireland building, against liability for accidents growing out of the neglect of the firm, either to employees or persons not connected with the work, reserving the right to appear and defend in any actions arising under the policy. On the occasion of the accident Messrs. Cornell notified the insurance company, and the New York manager of the company called up by telephone its attorney, Mr. Johnson, and called his attention to the fact of such notification, giving no special instructions in the matter. Mr. Johnson, at the suggestion of Mr. Cornell, one of the insured, employed the plaintiff to investigate as to the cause of the accident and to make a report.

It is claimed on the part of the defendant that this employment was in behalf of the Cornells, who were likely to be called upon to answer criminally, but upon the trial the court stated that this was a question of fact for the jury to determine, and we see no reason for disturbing the ruling or the finding of the jury.

It is urged also that in any event the amount of the charges for the



services of the plaintiff in attendance at the coroner's investigation and in giving expert testimony should be deducted from the verdict on the grounds that the service was exclusively for the benefit of the Cornells in defense of the criminal prosecution to which they might be liable and not within the scope of the policy issued by the defendant, and, therefore, not within the province of the attorney of the company to employ the plaintiff for this purpose. It appears, however, in the evidence upon the trial that the plaintiff attended the coroner's investigation for the purpose of informing himself as to the facts which it might be necessary to controvert in future litigations, and that he visited the building from time to time where the accident occurred in order to inform himself as to the facts in respect to which the witnesses testified. All of these things were proper and necessary in qualifying himself for the work which he was expected to do as an expert witness, and we see no reason why the defendant, having employed him, should not pay him for all work which he may have performed in perfecting himself in the details of the accident.

The fact that the coroner's verdict did not affect the rights of the defendant as the insurer of the Cornells for civil damages has no bearing upon the case; this plaintiff was there for the purpose of learning the points on which it was necessary for him to be specially prepared, and it was a legitimate part of his labors in making an investigation of the causes which led up to the accident. The charge of the trial court in respect to this question substantially complied with the request of the defendant's attorney, and there was no error of which the defendant could fairly complain.

The questions involved were questions of fact fairly within the province of the jury, and the verdict is in accordance with the evidence.

The judgment and order appealed from are affirmed.

All concurred, except CULLEN, J., not sitting.

Judgment and order affirmed, with costs.

In the Matter of the Petition of JOHN NEWTON, as Commissioner of Public Works, to Acquire Lands under Chapter 490 of the Laws of 1883, for a Storage Reservoir in the Town of South East, New York, known as "Double Reservoir I."

THE MERCANTILE TRUST COMPANY, Appellant; DELIA SHERWOOD, Respondent.

*Moneys paid into court by New York city in condemnation proceedings—they are subject to the control of the court, and it may change the custodian to the end that the life tenant may receive a higher rate of interest—notice of the proposed change must be given to the remaindermen.*

Moneys deposited by the city of New York, pursuant to the act relative to a new aqueduct (Laws of 1888, chap. 490, § 17), in a trust company designated by the court, accompanied by instructions that the interest be paid to a described person for life, and that after her death the principal be distributed, under the order of the court, to the persons legally entitled to receive it, are thereafter in the custody of the court, and it, in the interest of the life tenant, may direct them to be transferred to a county treasurer who will secure for their use a higher rate of interest than the trust company allows, but this will not be done unless the remaindermen are given notice of the application.

APPEAL by The Mercantile Trust Company from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 5th day of January, 1898, granting the petition of Delia Sherwood for an order directing The Mercantile Trust Company to pay to the county treasurer of Putnam county certain funds on trust in said trust company.

*William Cooper Prime*, for the appellant.

*Frederic S. Barnum*, for the respondent.

WOODWARD, J. :

The Legislature of this State in June, 1883, enacted chapter 490 of the Laws of 1883, entitled "An act to provide new reservoirs, dams and a new aqueduct, with the appurtenances thereto, for the purpose of supplying the city of New York with an increased supply of pure and wholesome water." Section 17 of this act, so far as it is necessary for the purposes of this discussion, reads as follows : "Whenever the owner or owners, person or persons, interested in

any real estate taken or affected in such proceedings, or in whose favor any such sum or sums or compensation shall be so reported, shall be under the age of twenty-one years, of unsound mind, or absent from the State of New York, and also in all cases where the name or names of the owner or owners, person or persons, interested in any such real estate shall not be set forth or mentioned in the said report, or where the said owner or owners, person or persons, being named therein cannot upon diligent inquiry be found, or where there are adverse or conflicting claims to the money awarded as compensation, it shall be lawful for the said mayor, aldermen and commonalty to pay the sum or sums mentioned in the said report, payable, or that would be coming to such owner or owners, person or persons, respectively, with interest aforesaid into such trust company as the court may, in the order of confirmation, direct, to the credit of such owner or owners, person or persons, and such payment shall be as valid and effectual, in all respects, as if made to the said owner or owners, person or persons, interested therein, respectively, themselves, according to their just rights."

Under the provisions of this statute the court, in January, 1891, ordered that a certain sum of money known as "Parcel 70" should be deposited with the Mercantile Trust Company, the interest on which should be paid to Delia Sherwood during her natural lifetime, and, at her death, to be distributed, on the further order of the court, among the persons legally entitled to receive the same. On a petition to a Special Term of the Supreme Court, in which it was alleged that the county treasurer of Putnam county would pay a higher rate of interest than the Mercantile Trust Company, it was ordered that the trust company pay over the funds in parcel 70 to the treasurer of Putnam county, who was ordered to pay the interest to the petitioner, Delia Sherwood, and to distribute the fund, at her death, as directed in the original order of the court. The Mercantile Trust Company appeals from this order, and urges that, under the provisions of section 17 of chapter 490 of the Laws of 1883, the court has no power to direct this fund to be paid to any other than a trust company. The object of the statute was not to interfere with the general power of the court to superintend funds within its legitimate control, but to provide a place of deposit which should meet the requirements of the Constitution by enabling the city to make com-

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pensation for lands taken in carrying out the objects of the law. It made it lawful for the city to pay the money into the custody of such trust companies as the court should designate, but it did not deprive the court of its right to protect such funds against an unreasonable reduction of interest, or prevent its exercising control of the money for the protection of those who are to come into possession at the close of the life estate in the property taken. The court has the right, and it is its duty, to see that the life estate of Delia Sherwood in the property taken is not made practically valueless; that the property is not taken from her without just compensation, through the operation of the trust company in lowering its rate of interest, when this can be done with safety to those who are to come into subsequent possession. Whenever it appears to the court that the fund is not realizing that rate of income which it is reasonable to expect, and when there is an opportunity to place it where it will become more productive, without infringing upon the rights of others, it is clearly within the power of the court to order the transfer of the fund. The city having paid in the money to a trust company, designated by the court, its responsibility ends, and the fund comes under the general guardianship of the court for the benefit of those who shall be the lawful heirs at the time of the death of Delia Sherwood, who had the life estate in the property from which this fund, known as parcel 70, was realized, the avails of which belong to her during her lifetime. And were these the only considerations involved, we should affirm the order appealed from.

We think, however, that, before the fund shall be reinvested under the order of the court, the persons entitled to the remainder after the termination of the life estate are entitled to notice of the application so to do, and we are of the opinion that the Mercantile Trust Company, being the present custodian of the fund, has sufficient standing in court to appear and request that this be done.

The order of the Special Term is reversed, without costs, with leave to renew the motion upon notice as heretofore indicated.

All concurred.

Order reversed, without costs, and with leave to renew the motion upon notice as indicated in the opinion.

B. EDMUND HAUPT, Respondent, v. PAUL K. AMES, Appellant,  
Impleaded with EDWARD J. GAVEGAN.

*Action for false representations — a defendant admitting the fraud cannot interpose a counterclaim.*

The complaint in an action alleged that the defendant by false statements induced the plaintiff to invest money in the stock and bonds of a foreign corporation to his damage. The answer admitted that the statements made were false, and attempted to interpose a defense in the nature of a counterclaim, to which the plaintiff demurred.

*Held*, that the plaintiff's cause of action being in tort a counterclaim could not be interposed to the complaint, and that the demurrer should be sustained.

APPEAL by the defendant, Paul K. Ames, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 15th day of October, 1897, upon the decision of the court rendered after a trial at the Kings County Special Term, sustaining the plaintiff's demurrer to a counterclaim set up in the answer of the defendant, Paul K. Ames.

*Samuel R. Taylor*, for the appellant.

*E. F. Bullard*, for the respondent.

WOODWARD, J. :

The plaintiff alleges as a cause of action that the defendant made to him certain specific statements in reference to the affairs of the Columbian Pharmacal Company, a foreign corporation doing business in the State of Connecticut, for the purpose of inducing this plaintiff to invest his money in the stock and bonds of the said company; that, relying upon these statements and believing them to be true, the plaintiff did purchase five of the bonds of the said company, together with fifty shares of the stock, paying therefor \$3,000 in cash, and agreeing to pay \$625 on the 1st day of March, 1894, and \$1,000 on the first day of June following; that these statements were false, and that the defendant knew them to be false at the time they were made, and that the plaintiff, by reason of such investments, made in the belief that the statements were true, has suffered damages to the extent of \$3,000, for which amount he demands judgment.

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The defendant, answering, admits that the statements made were false, and attempts to put in a defense in the nature of a counterclaim, to which the plaintiff demurred, and from the order of the court directing an interlocutory judgment and sustaining the demurrer, appeal comes to this court. So much of the order of the court as is necessary for the purposes of this discussion reads as follows:

“Ordered and adjudged, that said demurrer be and is hereby sustained, and an interlocutory judgment is directed to be entered in favor of the plaintiff determining that said counterclaim is not of the character specified in section 501 of the Code of Civil Procedure, and that it does not state facts sufficient to constitute a cause of action.”

The defendant urges that the action is not one in tort, and that the counterclaim comes within the rule laid down in *Carpenter v. Manhattan Life Ins. Co.* (93 N. Y. 552), where Judge EARL, delivering the opinion of the court, says: “The counterclaim must have such a relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation.”

How can a defendant, admitting the false statements constituting the basis of fraud, contend that there is any controversy in which it would be “just and equitable” that the “matters alleged in the complaint and in the counterclaim” should be settled in one action?

This defendant cannot come into court admitting the fraud and undertake to interpose a counterclaim; no act that the plaintiff may have committed subsequently, and no cause of action which the defendant may have against the plaintiff, can be admitted as an offset to the false statements, resulting in a fraud upon the plaintiff, and which constitutes his cause of action. The case of *Byrnie v. Wood* (24 N. Y. 607), on which the defendant relies for authority that this action is not an action sounding in tort, fails to sustain this theory. The court held in this case that “The facts, as found by the referees, are that, by false representations and the alteration of bills and vouchers, the defendant himself received from Marvine large sums of money to which he was not entitled; and they have found that the plaintiffs are entitled to recover, not for any fraud, but for

the money which the defendant had so received, and which, being so received, he had no right to retain. This state of facts does not necessarily require an action to be brought for the tort, even if it allows one to be so brought."

In discussing the question of whether an action for a tort could be assigned, the court in the same case say: "The authorities cited by the defense in support of this position (*Addington v. Allen*, 7 Wend. 9; *Zubriskie v. Smith*, 3 Kern. 333) go far to answer the position; since they show just what that action is, and that it is not for false and fraudulent representations by which the defendant himself obtained money or property, but for such representations, as to the credit and responsibility of a third person, as induced the plaintiffs in those suits to sell property on credit to such third person, and thereby the plaintiffs were injured, though neither the defendant nor his property was benefited. So far as the defendant's act and the defendant himself were concerned it was a mere naked tort."

That is the situation of this defendant; he is charged in the complaint with having induced the plaintiff, by false and misleading statements of the condition of the Columbian Pharmacal Company, to invest his money in the stock and bonds of the said company, and these false statements as to the condition of the company constitute the only cause of action of the plaintiff as against this defendant, and there can be no question that it is an action sounding in tort. As was said in the case of *People v. Dennison* (84 N. Y. 272), "it was consequently an action in which a counterclaim founded on contract could not properly have been allowed. (*Smith v. Hall*, 67 N. Y. 48; Code, § 150; *Pattison v. Richards*, 22 Barb. 143.) The claim of the defendants was a cause of action, not arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. The subject of the action was a fraud alleged to have been committed by the defendants upon the plaintiff, the allegation being that the defendants fraudulently obtained money from the State by means of false representations, false vouchers and collusion with State officers. The counterclaim was that the State was indebted to the defendants on contract for work and materials which had not been paid for. The circumstance that the work in respect to which the fraudulent representations charged were alleged

to have been made was the same for which the defendants claimed that an indebtedness existed in their favor, does not bring the case within section 150 of the Code. The subject of this action, which was the fraud, was wholly distinct from the claim set up by the defendants for money due on the contract for the work. Nor has section 150 been regarded as conferring the right to set up a counterclaim founded on contract, in an action of tort."

It being apparent, therefore, that the defendant could not interpose a counterclaim in this action, it is not necessary to go into the consideration of the question of whether or not the allegations of the defendant are sufficient to constitute a cause of action.

The order of the court below, sustaining the demurrer and directing an interlocutory judgment, is affirmed.

All concurred.

Interlocutory judgment affirmed, with costs.

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HENRY C. GRIFFIN, as Trustee for the Benefit of the Bonds Secured by a Mortgage or Deed of Trust, Executed by the Trustees of Solomon's Lodge No. 196, Free and Accepted Masons, Respondent, v. LOUIS BAUST, Respondent, and Others, Defendants; THOMAS G. PRICE, Purchaser, Appellant.

*Marketable title — encroachment of a building on another lot — effect of a subsequent ownership of both lots by the same person — notice of the appointment of a new trustee of a mortgage — authority of an agent to execute a lease for more than a year — it must be in writing.*

One Bird, a member and one of the trustees of a Masonic lodge, was employed by it as superintendent and architect to erect a building on a lot belonging to the lodge on which the lodge had previously executed a mortgage to a trustee to secure certain bonds, and while so acting Bird established the south line of said building, he himself being the owner of the lot which abutted upon the lodge lot on the south. A question having arisen as to whether the building encroached upon Bird's lot, he conveyed to the lodge a strip of land southerly of and adjoining the building, one foot wide. Thereafter the lodge conveyed to Bird the entire premises, including the one foot conveyed to it by Bird, and subsequently Bird conveyed the same premises to one Baust, subject to the payment of the bonds and mortgage which Baust assumed.



*Held*, that Bird and those who claimed under him were estopped from subsequently alleging that the wall encroached on the adjoining lot, as the encroachment ceased at the moment when he became the owner of both lots, and any conveyance of the adjoining lot subsequently made by him would be chargeable with the servitude of the encroaching wall ;

That the Supreme Court had power on the death of the trustee of the mortgage to appoint a successor, and that the fact that the holder or holders (who were unknown) of one twenty-first part of the bonds had not joined in or ratified such appointment, did not deprive the court of jurisdiction to make it;

That a title acquired at a sale of the premises under a foreclosure of such mortgage, at which sufficient money had been realized to pay all the bonds, was not affected by the fact that the substituted trustee had been so appointed.

A lease under seal for more than a year executed by agents, not authorized in writing by the lessor to execute it on his behalf, is void under the Real Property Law (Laws of 1896, chap. 547, § 224), and is not entitled to be recorded.

APPEAL by Thomas G. Price, a purchaser at a foreclosure sale, from an order of the Supreme Court, made at the Dutchess County Special Term and entered in the office of the clerk of the county of Westchester on the 19th day of January, 1898, requiring him to accept the title to premises sold under foreclosure in the action, and to complete his purchase.

*John H. Rogan*, for the purchaser, appellant.

*Joseph W. Middlebrook*, for the plaintiff, respondent.

*Greene & Johnson*, for Louis Baust, defendant, respondent.

GOODRICH, P. J. :

The premises in question were sold to the appellant Price by a referee, under a judgment of foreclosure and sale, for the sum of \$23,250, and the deposit of ten per cent was made with the referee. The purchaser refuses to accept the referee's deed on the following grounds :

“(a) That the building upon the premises, purchased by him herein, encroaches upon the adjoining premises on the southerly side, and also on the northerly side, whereby the value of the premises sold is materially and largely diminished, and the record owner of said adjoining premises claims that the foundation of the southerly wall of said building encroaches upon his land to a considerable extent beyond the encroach of said wall, and he notified the purchaser that he intended to commence an action to compel the removal of said wall and foundation at once.

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“(b) That the appointment of Henry C. Griffin as trustee, under the mortgaged (*sic*) foreclosed in the above-entitled action, is invalid.

“(c) That there is an outstanding lease of the premises sold made to Isaac H. Lubin, dated September 29th, 1896, and recorded in the office of the register of the county of Westchester, in liber 1460 of conveyances, page 140, for the term of three years from October 1st, 1896, with the privilege of a renewal for three years.”

Prior to January 12, 1885, the defendant James Bird conveyed to Solomon's Lodge No. 196, Free and Accepted Masons, the premises at Tarrytown, described in the mortgage, complaint and judgment, fronting forty feet on Orchard street and thirty-five feet on Cottage Place, and bounded on the north by Central avenue and on the south by lands of Bird, who, at that time, owned the premises adjacent on the south, more than eighty feet in width. At the date named the lodge executed a mortgage for \$21,000 on the premises, conditioned for the payment of 210 bonds, each of the par value of \$100. D. O. Bradley was the trustee named therein, and continued to be trustee until his death in February, 1895. A petition was presented to the Supreme Court in Westchester county for the substitution of a trustee in his place, and the plaintiff Griffin was appointed by order of the court, made on November 14, 1896.

As to the first objection, of encroachment, it appears that after the conveyance to the lodge the latter erected upon the premises a large building which encroached on the land of Bird, adjoining it on the southerly side, from five-eighths of an inch to one inch.

In the affidavit of the defendant Bird, used on the motion, he stated that at the time of the execution of the mortgage he was a member and one of the trustees of the lodge, and was employed by it, as superintendent and architect, to erect the building, and that he acted in that capacity, and that he, “being the owner of the adjacent premises (on the south), first established the south line of said building.” At that time he was still the owner of the land south of the building, and some question, apparently, having arisen about the encroachment of the wall upon his adjacent lot, he conveyed to the lodge a strip of land southerly and adjacent to the building, one foot in width.

At a later period, and in December, 1894, the lodge conveyed to Bird the entire premises, including the premises described in the

mortgage and the additional foot of land, subject to the payment of the bonds and mortgage above referred to. In July, 1896, Bird conveyed the same premises to the defendant Baust, subject to the payment of the bonds and mortgages, which Baust, in the deed, agreed to assume and pay. Thus it appears that, since the execution of the mortgage, the lodge, Bird and Baust have, each in turn, and respectively at the same time, owned the forty feet, one inch, included in the mortgage, and the adjacent strip of one foot, so that the encroachment, if any existed, ceased on the instant of the common ownership of the two parcels by each of the three parties named.

In the case of *Katz v. Kaiser* (154 N. Y. 294) the doctrine is laid down that if the owner of a lot on which there is a building whose wall encroaches upon the adjoining land acquires title to the adjacent lot, the encroachment ceases *eo instanti*; even if he subsequently severs the title to the lots, the adjoining lot is charged with the servitude of the wall, and the title to the dominant lot is not open to the objection that it encroaches upon the adjoining lot.

In addition to this, it will be observed that Bird established the division line between the southerly boundary of the premises conveyed to the lodge, at the time he was the owner of the premises adjacent on the south, and erected the wall in question. It is clear that this action on his part, taken in connection with the subsequent conveyances, would estop him to deny the proper location of the wall, even without any such long continuance of the location as the authorities hold to be binding between the owners of adjacent lots.

The second part of the first objection is that the eaves of the building on the north side overhung a strip of land between such wall and Central avenue, but the record shows that this strip was voluntarily thrown into the street by the owner; that the village has merely an easement, and that the official engineer and surveyor of the village has testified that the building, in this respect, does not violate any ordinance of the village. This objection is not specifically argued in the appellant's brief.

The second objection, to the substitution of the plaintiff as trustee in place of Bradley, rests upon the contention that due notice of application for his substitution was not given to the holders of all the bonds secured by the mortgage. Chapter 185 of the Laws of 1882 provides that "Upon the death of a surviving trustee of an

express trust, the trust estate shall not descend to his next of kin or personal representatives, but the trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court. But no person shall be appointed to execute said trust until the beneficiary thereof shall have been brought into court by such notice, and in such manner as the court may direct."

In *New York Security Co. v. Saratoga Gas Co.* (88 Hun, 569, 584) a question arose as to the appointment by the court of a new trustee of a mortgage in place of the one named in the mortgage, where the original trustee had become insolvent. The court held that "The plaintiff is properly acting as trustee of the gas company. The Court of Chancery had jurisdiction of trusts and trustees, and had power, independent of any statute, to remove a trustee on good cause shown, and to appoint another in his place. The Supreme Court has succeeded to the jurisdiction and power of the Court of Chancery, and it seems to me unnecessary to cite authorities to prove its jurisdiction and power to appoint one trustee in the place and stead of another. The original trustee under the mortgage becoming insolvent, the Supreme Court had jurisdiction to appoint a successor trustee; its order making such appointment was, therefore, not a void order, but may have been, under the circumstances, irregular." But, under my views of the rules to be adopted on this appeal, it is not necessary to consider this question. The court had jurisdiction to make the order and to require such notice as it deemed expedient, and it must be presumed that sufficient notice was given.

The petition for the substitution was presented or joined in by the holders of \$12,000 of the bonds, and has since been ratified by all the bondholders, except the owners of \$1,000, whose whereabouts cannot be discovered, so that the only question is whether the failure to notify the holders of ten bonds constitutes a valid objection to the appointment of the trustee. It is not necessary to inquire whether the appointment of Griffin, as trustee, can be attacked collaterally. The only persons who could attack were the holders of the ten bonds, the lodge, and Bird and Baust. All of these, except the bondholders, were parties defendant in the foreclosure suit.

The complaint alleged the due appointment of Griffin as trustee. None of these parties defended, and as to them the judgment becomes *res judicata* as to the due appointment of Griffin as trustee, so that none of these parties can raise the question of defective appointment.

The price to be paid for the property is sufficient to pay the bonds, interest and costs. When the purchaser has completed the sale and paid the money into court, it will be sufficient time for the court, at Special Term, to provide security for such bondholders; as, for instance, by having the amount of the bonds deposited with the treasurer of Westchester county, or some other suitable depository. This question, however, does not arise on this appeal.

The third objection relates to a lease to one Lubin, for the term of three years, of a part of the mortgaged premises, dated September 29, 1895, and recorded May 29, 1897. The lessors named in this lease were "Free and Murray, as agents for Louis Baust," and it was signed "Free & Murray, Agts. (Seal.)" The acknowledgment reads, "before me personally came Free & Murray, agents for Louis Baust and Isaac H. Lubin, to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and who severally acknowledged that they executed the same, and the said Free & Murray duly acknowledged that they executed the foregoing lease as the agents of said Louis Baust."

The Real Property Law (5 R. S. [9th ed.] 3588 [1896, chap. 547], § 224) provides that "a contract for the leasing for a longer period than one year, \* \* \* of any real property or an interest therein, is void, unless the contract or some note or memorandum thereof expressing the consideration is in writing, subscribed by the lessor \* \* \* or by his lawfully authorized agent."

It appears that Free & Murray had no written authority to make this lease. There was, under these circumstances, no statutory authority for the recording of the lease. Besides this, Baust was a party to the foreclosure suit, and is estopped by the judgment.

The objections raised by the purchaser were not valid, and the order must be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

SARAH E. HOUSE, Appellant, v. ERIE RAILROAD COMPANY,  
Respondent.

*Negligence — a woman injured at a railroad crossing — proof which requires the submission to the jury of the question of contributory negligence.*

In an action brought against a railroad company to recover damages for personal injuries sustained by the plaintiff at a railroad crossing on a village street where gates, which had been in use for a long time, were frozen and out of order, the plaintiff testified: "Before I got to the track I looked up the track and down around the curve. That was before I got to the track. I should think I was then five or ten feet from the track. I did not see any train coming in either direction. I did not hear any bell or whistle blown. I did not see any flagman. \* \* \* Then, after I started on, my attention was directed straight ahead, and the last I remember I was struck by this engine. \* \* \* I had known these gates there at the crossing for years. \* \* \* I know what it means when the gates are up. I understand that that is a signal for me to cross if I so desire. When they are down I understand that that is the signal for me to stay back. This day that I was struck there was no flagman upon the crossing. \* \* \* Before I crossed that crossing that day I listened for bell or whistle. I didn't hear any bell rung or whistle blown."

*Held*, that the trial court erred in directing a verdict in favor of the defendant.

APPEAL by the plaintiff, Sarah E. House, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Orange on the 29th day of June, 1897, upon the dismissal of the complaint by direction of the court after a trial before the court and a jury.

*William Vanamee*, for the appellant.

*Henry Bacon*, for the respondent.

GOODRICH, P. J. :

The action was brought to recover damages for injuries sustained by the plaintiff on December 16, 1895, by being struck by an engine drawing a train, while she was attempting to cross defendant's tracks at Main street in the village of Goshen. At the close of the plaintiff's case the complaint was dismissed upon three grounds: That there was no negligence proven on the part of the defendant or its employees; that the evidence shows contributory negligence on the part of the plaintiff in going to the track at the time and place where she did; and that there was no evidence which would justify the jury in finding that the plaintiff was not guilty of contributory

negligence. The plaintiff asked leave to go the jury on several questions of fact, a statement of which is not now essential.

The dismissal of the complaint was error, unless from the evidence the court was justified in holding, as matter of law, that the plaintiff was guilty of contributory negligence.

The trend of judicial authority in this State, except where the proof of misconduct is clear and decisive, requires the court, in cases of this character, to submit to the jury the question of contributory negligence, as matter of fact, instead of deciding it as matter of law.

In the case of *Ernst v. Hudson River Railroad Co.* (35 N. Y. 9, 36, 38) the court, PORTER, J., writing the opinion, said :

"It is not true that a traveler on a public thoroughfare is guilty of culpable negligence, as matter of law, if he does not stop to listen, or look up and down the track before he goes over a crossing. The proposition is in direct conflict with repeated adjudications in this and in other courts. Whether such an omission is culpable depends upon the facts and circumstances of each particular case. \* \* \* The question whether the plaintiff was free from negligence, in ordinary cases of this description, is one of fact to be determined by the jury, under appropriate instructions and subject to the revisory power of the courts. Occasional instances occur where the proof of misconduct is so clear and decisive that the judges are bound to pass on the question of negligence as matter of law."

In the case of *Glushing v. Sharp* (96 N. Y. 676) the court said: "The evidence showed that no bell was rung or whistle blown, and that the gate was raised, and thus the carelessness of the defendant was established. But the claim of the defendant is that the plaintiff should have been nonsuited on account of his own carelessness, and this claim he bases upon these facts: That, at the place where the plaintiff looked, about thirty feet from the railroad track, his view was somewhat obstructed, and that he did not look again while passing the thirty feet, although during that space his view was unobstructed, and he could have seen the train if he had looked. We think the case as to plaintiff's negligence was properly submitted to the jury. He looked both ways, and whether, under all the circumstances, he should have looked again, or continued to look, was for the jury to determine. The raising of

the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience. The conduct of the gatemen cannot be ignored in passing upon plaintiff's conduct, and it was properly to be considered by the jury with all the other circumstances of the case."

It is not necessary to refer to other authorities upon this proposition. Nor is it needful to cite authorities in support of the proposition that, upon the review of a judgment based upon a nonsuit, all the testimony is to be construed in that light which is most favorable to the plaintiff.

There was evidence in this case tending to show the following facts: The plaintiff, a woman sixty years of age, in full health and familiar with the scene of the accident, came in a wagon from her home in the village of Florida, about six miles from the place of the accident, and drove across the defendant's tracks. After tying her horses, she recrossed the track for the purpose of shopping at a store on the westerly side of the track, and then walked toward the railroad crossing again. She testified as follows: "Before I got to the track I looked up the track and down around the curve. That was before I got to the track. I should think I was then five or ten feet from the track. I did not see any train coming in either direction. I did not hear any bell or whistle blown. I did not see any flagman. \* \* \* Then, after I started on, my attention was directed straight ahead, and the last I remember I was struck by this engine. \* \* \* I had known these gates there at the crossing for years. \* \* \* I know what it means when the gates are up. I understand that that is a signal for me to cross if I so desire. When they are down I understand that that is the signal for me to stay back. This day that I was struck there was no flagman upon the crossing. \* \* \* Before I crossed that crossing that day I listened for bell or whistle. I didn't hear any bell rung or whistle blown."

There was other evidence as to the flagman, both as to his presence and his acts, but on this appeal we must hold that the testimony presented by the plaintiff furnished some evidence of his absence or inattention to his duty.



Main street is a well-traveled public highway in the village of Goshen. At the intersection of the railroad there were gates which have been in use for a long time, but which, at the time of the accident, were out of order. The weather was quite cold and had been for several days. The defendant contends, as shown by the cross-examination of one of the plaintiff's witnesses, that the gates were frozen and out of order and had been so for four or five days. It does not appear exactly how long this condition had existed nor how the gates could be frozen for a long period, but at the time of the accident the gates were raised. A flagman was in the vicinity, but there is evidence tending to show either that he was not at his post, or that, if at his post, he had his flag rolled up and under his arm; and there is no evidence that he warned the plaintiff of the proximity of the train. It is a fair construction of the evidence that the gates had been in use for a period of time which justified the plaintiff, accustomed to travel upon the highway, in assuming that when lifted they were an assurance that no train was about to cross the highway. It is evident that the defendant held the same view when it stationed a flagman at the point in question. The learned counsel for the company, in speaking of the fact that the gates were lifted and frozen so as to be incapable of lowering, says in his brief: "It was for this reason that the flagman was upon the crossing."

Many cases may be found which arose under the Railroad Law as it existed prior to the recent revision, when the engineer of a railroad train was by statute compelled to whistle eighty rods from a highway which he was about to cross. The case of *Ernst v. Hudson R. R. Co.* (*supra*) was decided when this provision in the Railroad Law was in force. This statute has been repealed, and so far the decision has no application to this case. The court in that case decided that the crossing of a highway by a railroad train without the whistle was a breach of duty, that the omission of customary signals was an assurance by the company that no engine was approaching within eighty rods of the crossing, and that a person might rely upon such assurance without the imputation to a wrongdoer of a breach of duty, and that when the usual warning is withheld the wayfarer has a right to assume that the crossing is safe; that a person traveling the highway is bound only to exercise ordinary care, and when he is injured by the negligence of a railroad

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company it is no defense that, notwithstanding the omission of the lawful signals, he might by greater vigilance have discovered the approach of the train.

*Beisiegel v. New York Central Railroad* (34 N. Y. 622, 633) was another case of failure to sound a whistle, but in the concurring opinion, PORTER, J., said :

“ Upon this state of facts, it is obvious that the gross negligence of the defendant's agents was the sole cause of the injury. The omission of the customary signals was an assurance by the company to the plaintiff that no engine was approaching within a quarter of a mile on either side of the crossing. On this he was entitled to rely, and to the defendant he owed no duty of further inquiry. He was not bound to be on the lookout for danger when assured by the company that the crossing was safe.”

A later case (*Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234) affirms this doctrine, in these words: “ The duty of the company was imperative, and it is obvious that an open gate was a direct and explicit assurance to the traveler that neither train nor engine was rendering the way dangerous—that none was passing. A closed gate was an obstruction preventing access to the road; an open gate was equally positive in the implication to be derived from it that the way was safe. Nothing less could be implied and no other conclusion could be drawn from that circumstance.”

It makes no difference that there is no proof in this case that the company was by any municipal regulation required to maintain gates at the crossing on Main street, as it had actually maintained them there for a considerable period, a fact of which the plaintiff was aware and upon which she had a right to rely and to assume that the open gates indicated that no train or engine was about to cross the highway. The issue was, therefore, whether she had exercised ordinary care in crossing the track.

Under the authorities cited, a question of fact was raised and not a mere question of law, and the refusal of the court to submit the question to the jury, as requested by the plaintiff's counsel, was error for which the judgment must be reversed.

All concurred, except BARTEETT, J., who concurred in the result.

Judgment reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. CONRAD STOCK, Respondent.

*Liquor Tax Law*—an offender against its provisions cannot be sentenced to an imprisonment of one day for each dollar of the fine unpaid—discharge under a writ of habeas corpus.

The provisions of sections 484 and 718 of the Code of Criminal Procedure, providing that a judgment which imposes a fine may also direct that the criminal be imprisoned until the fine be paid, for a term not to exceed one day for each dollar of the fine, are not applicable to a conviction under the Liquor Tax Law (Laws of 1896, chap. 112, § 84) which makes a sale of liquor by one not having a liquor tax certificate a misdemeanor, punishable by fine and imprisonment, but contains no specific authority to sentence the criminal to imprisonment for non-payment of the fine, the latter statute being designed to cover the whole subject, both prescribing the punishment and the manner in which the fine shall be collected.

Where in such a case a sentence of imprisonment has been imposed for the non-payment of the fine, the prisoner may be released under a writ of habeas corpus.

APPEAL by the plaintiff, The People of the State of New York, from an order of the Supreme Court, entered in the office of the clerk of the county of Dutchess on the 18th day of December, 1897, directing the sheriff of the county of Dutchess to discharge the defendant from his custody.

*George Wood*, for the appellant.

*Charles A. Hopkins*, for the respondent.

GOODRICH, P. J.:

The defendant, Stock, was convicted in the County Court of Dutchess county on December 13, 1897, under section 34 of the Liquor Tax Law (Laws of 1896, chap. 112), of selling liquor without having obtained a liquor tax certificate, and was sentenced to pay a fine of \$300, and in default of payment, to stand committed to the county jail for a term not to exceed one day for each dollar of the fine. On December eighteenth he was discharged under a writ of habeas corpus, the order being based upon the theory that the statute did not authorize imprisonment for non-payment of the fine. Two questions arise: *First*, the jurisdiction of the County Court to

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impose the sentence of imprisonment, and, *second*, the right of the court to review it upon a writ of habeas corpus.

Section 34 of the Liquor Tax Law (5 R. S. [9th ed.] 3492) provides as follows:

“§ 34. **Penalties for violations of this act.**—1. Any corporation, association, copartnership or person trafficking in liquors who shall neglect or refuse to make application for a liquor tax certificate or give the bond, or pay the tax imposed as required by this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than two hundred nor more than two thousand dollars, provided such fine shall equal at least twice the amount of the tax for one year, imposed by this act upon the kind of traffic in liquors carried on, where carried on, and may also be imprisoned in a county jail or a penitentiary for the term of not more than one year.”

This section provides for the infliction of a fine of not less than \$200, and, in addition, imprisonment in the county jail for not less than one year. It does not provide for a commitment to the county jail for a term not to exceed one day for each dollar of the fine, but it is claimed that as the Liquor Law declares the act a misdemeanor, it falls within the provisions of sections 484 and 718 of the Code of Criminal Procedure, which read:

“§ 484. *Judgment to pay fine* \* \* \* A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine.”

“§ 718. *Judgment of imprisonment, until fine be paid; extent of imprisonment.*—A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine.”

The question arises whether sections 484 and 718 are applicable to the imprisonment mentioned under section 34 of the Liquor Tax Law, which was passed subsequently to the cited sections of the Code of Criminal Procedure.

Section 36 of the Liquor Tax Law (5 R. S. [9th ed.] 3494) provides that the fine must be docketed as a judgment against the person convicted, in favor of the State Commissioner of Excise, and if

the judgment shall not be paid within five days after the sentence, the clerk of the county shall issue an execution against the property of the judgment debtor, and that the levy thereunder shall take precedence of any and all liens, mortgages, conveyances or incumbrances, on the property of the judgment debtor, subsequent to the docketing of the judgment; and that no property of the debtor shall be exempt from such levy and sale, and that where the debtor has furnished the bond authorized by section 18 of the act, the amount of the judgment may be collected from the sureties on such bond.

The learned judge at Special Term held that the imposition of a fine merely was in no sense a criminal punishment, as the statute provided that the debtor might be punished by imprisonment in addition to the fine, and that he could not be imprisoned simply for non-payment of the fine. I think this view is correct.

The 34th section of the Liquor Tax Law provides a specific punishment for the offense therein defined, and the County Court could resort alone to it and section 36 for the punishment and power to enforce sentence. It contains specific directions for sentence for the offense and must be strictly construed. No specific authority can be found in its provisions for imprisoning the defendant for non-payment of the fine. In this view of the completeness of the statute within itself and of all matters relating to offenses thereunder, I am further confirmed by its provision providing for the giving of a bond by each applicant for a tax certificate. It is true that the offense for which the petitioner was convicted was that he neither applied for nor obtained the certificate; but I refer to the bond simply for the purpose of illustrating the reach of the statute.

Still further confirmation of this view is found in *Matter of N. Y. Institution* (121 N. Y. 234, 239), where the court held "that where prior laws are revised and consolidated into a new act, such act is to be deemed to contain the entire law upon the subject, and that a prior provision of law which is dropped, is to be regarded as repealed. In *Ellis v. Paige* (1 Pick. 43) it is said: 'It is a well-settled rule that when any statute is revised, or one act formed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the Legislature gross careless-

ness or ignorance, which is altogether inadmissible.' In *Bartlett v. King* (12 Mass. 537) it was held that a subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, upon principles of law, as well as in reason and common sense, operate to repeal the former."

There is authority for holding that, under statutes which define certain offenses as misdemeanors, a writ of *levari facias* may be issued to enforce the payment of a fine, but these cases arose under statutes which did not contain any specific method of enforcing the collection of the fine.

This subject was before the court in the case of *People ex rel. Gately v. Sage* (13 App. Div. 135), where, on conviction for assault in the second degree, the prisoner was sentenced to be imprisoned in the State prison and to pay a fine of \$730, and, in default of payment of the fine, that he be further imprisoned in said State prison until the fine was paid, not exceeding 730 days. This sentence was pronounced under section 221 of the Penal Code, which provides that the crime shall be punishable "by imprisonment in a penitentiary or state prison for a term not exceeding five years, or by a fine of not more than one thousand dollars, or both." In this section there is no special provision for imprisonment in default of the payment of the fine, but this is supplemented by section 484, above cited, and this court (p. 137) said: "If the judgment cannot direct that the defendant stand committed, after the expiration of five years, till the fine be paid, the provision that he may both be imprisoned for five years and fined \$1,000 is rendered nugatory."

In the case at bar, however, there is a special provision for the enforcement of the fine, and this differentiates it from the *Sage* case.

Turning now to the opinion in *Colon v. Lisk* (13 App. Div. 195, 204; *affd.*, 153 N. Y. 188), referred to in *People v. Sage* (*supra*), this court held that, by the common law, the writ of *levari facias* to enforce the payment of a fine, was issuable by the common law on the ground that "it was an attribute of sovereignty authorizing the levy for a debt due to the crown by the united process against the body, the lands and goods of the defendant." This action was brought under the statute forbidding trespassing on oyster beds (Chap. 974, Laws of 1895, as amended by chap. 383, Laws of 1896).

The statute declared that any person who violated its provisions should be guilty of a misdemeanor. There was in this statute no provision for the issuing of an execution to enforce the payment of the fine, although the vessel and property used in the commission of the offense were made liable to seizure and sale. As the statute declared the offense a misdemeanor, recourse must be had to the sections of the Criminal Code, already cited (484 and 718), and to section 15 of the Penal Code, which reads: "A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both."

The case at bar again differs from this case in the important fact that specific provision is made in the Liquor Tax Act for the collection of the fine. The personal liberty of the prisoner being involved, I think the statute must be strictly construed, and that it does not authorize any commitment of a prisoner for non-payment of the fine imposed.

*Second.* I have no doubt that the question involved may be properly adjudicated upon a writ of habeas corpus, for the reason that the trial court had no jurisdiction or power, under the Liquor Tax Law, to impose a sentence of imprisonment for non-payment of the fine.

In the case of *People ex rel. Tweed v. Liscomb* (60 N. Y. 559) the court held that where the record shows that the judgment is not merely erroneous, but is such as could not, under any circumstances, or upon any state of facts, have been pronounced, the case is not within the exemption of the Habeas Corpus Act, excluding from its benefits persons committed by virtue of a judgment or decree of a competent tribunal, or if it appear that the judgment is in excess of that which by law the court had power to make, it is void for the excess, and can be so declared, and that the prisoner was entitled to discharge under habeas corpus.

A similar doctrine was announced by the Supreme Court of the United States in *Ex parte Lange* (85 U. S. 163). In that case the court below had imposed a fine and imprisonment, where it had

power only to impose a fine *or* imprisonment, and the fine had been paid. The court held that the prisoner, having paid the fine, was entitled to discharge under habeas corpus, and that the judgment of the court below, that is, the fine, having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of that court as to that offense was at an end.

In the present proceeding the judgment or the sentence of fine, as shown by the record, was pursued to its end by the entry of the judgment against the defendant therein and the issuance of an execution for the collection thereof. Under these circumstances, the defendant was not held or detained by virtue of the judgment or decree of any competent tribunal, in which case the writ of habeas corpus would not lie.

Since the foregoing was written, an opinion has been published in the case of *People ex rel. Bedell v. Kinney* (24 App. Div. 309), where a party was imprisoned under a similar sentence, and a writ of habeas corpus was issued before the expiration of six months' imprisonment. The Appellate Division of the fourth department reversed the order discharging the relator from imprisonment, but only on the ground that the writ was issued before the expiration of term of imprisonment, and was, therefore, premature, without referring to the question herein considered. Mr. Justice WARD, however, wrote a dissenting opinion, in which he discussed the question involved in the foregoing opinion and arrived at a conclusion similar to my own.

The order of the Special Term should be affirmed.

All concurred.

Order discharging relator affirmed.



JAMES H. MORAN, as Receiver, Appellant, v. SARAH C. ABBOTT,  
Respondent, Impleaded with JAMES J. CURRY.

*Replevin—demand necessary in case of a chattel sold conditionally—when the removal of the chattel by the vendee is not a conversion—presumption that a mailed letter was received—a denial of its receipt by a party in interest presents a question for the jury.*

The demand, which is a necessary condition to the maintenance of an action of replevin against a vendee who is in lawful possession of a chattel under a conditional contract for its sale, is not established by proof of a mere demand for the money due; it must be accompanied by a demand, in the alternative, for the chattel itself.

Where, in such an action, proof is made that the attorney for the vendor duly mailed a sufficient demand to the vendee at her proper address, her denial of its receipt does not overcome the presumption that she received the letter—she being a party in interest, her denial merely raises a question of fact for decision by the jury.

When the removal of the chattel from the house of the vendee cannot be treated as a conversion as a matter of law and thus render a demand unnecessary, considered.

APPEAL by the plaintiff, James H. Moran, as receiver, from a judgment of the Supreme Court in favor of the defendant, Sarah C. Abbott, entered in the office of the clerk of the county of Westchester on the 10th day of June, 1897, upon the verdict of a jury rendered by direction of the court.

The plaintiff, as receiver of the Mathushek Piano Manufacturing Company, brought an action in replevin to recover possession from the defendants of a certain piano purchased by the defendant, Sarah C. Abbott, from one James Pearce, doing business under the name of the Pearce Music Company, and as such company acting as the agent of the Mathushek Piano Manufacturing Company at the time of the purchase of said piano.

*William A. Abbott*, for the appellant.

*John C. Harrigan*, for the respondent.

HATCH, J.:

The piano, which is the subject of this action, came into the possession of the defendant Abbott by virtue of a lease of the same,

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coupled with a conditional agreement of sale. By the terms of this agreement Mrs. Abbott was to pay for the use of the piano \$7 a month, and when she had paid the sum of \$425 the vendor was to transfer title by bill of sale, the title prior to payment to remain in the vendor. The plaintiff is a receiver of this contract, and of all rights thereunder, having been appointed in an action brought by the Mathushek Piano Manufacturing Company against James Pearce, who was Mrs. Abbott's vendor. At the time this action was brought there was due upon the contract about \$180, and default in payment had been made by Mrs. Abbott. When the piano was delivered, in pursuance of the contract, Mrs. Abbott was unmarried and living with her mother. After her marriage she removed to New Jersey and the piano was left in the custody of her mother. The family moved after the delivery of the piano, and it was then removed with the knowledge of the vendor, although no written consent of removal was given by the vendor as provided in the contract. The piano was subsequently removed from the house of the mother to that of her son, the defendant Curry, and was replevined from the latter's possession. The only question presented by the record relates to whether a demand for the sums due under the contract, or for a return of the property, was made before the action was begun. The possession of the defendant was a lawful possession, and before the action could be maintained it was essential that a demand for a delivery of the property should have been made. (*Goodwin v. Wertheimer*, 99 N. Y. 149.) The court ruled that no such demand had been established and directed the jury to find a verdict for the defendant. To this ruling the plaintiff excepted. While the piano was in the possession of the mother the plaintiff called upon her and informed her of his appointment as receiver and requested her to make payment. She had been authorized by Mrs. Abbott to represent her in connection with the contract, consequently a good demand could have been made upon her. No such demand was made by the plaintiff at this time. He then called to give notice of his title and requested payment, and, upon Mrs. Curry's informing him that she was not prepared to pay, he arranged that another should call subsequently and receive it. This was sufficient to constitute a demand for payment, but he made no demand in the alternative

for payment or delivery of the property. Sherry, the agent of the plaintiff, testified that he called at Mrs. Curry's thereafter several times to obtain the money, and at these times demanded payment. But at no time does he claim that he demanded a return of the chattel. This testimony, therefore, fails to establish such demand as the law requires. The subsequent demands by Sherry were denied by Mrs. Curry, and if the demand had answered the requirement, it would still have left a question of fact for the jury.

The plaintiff, however, relied upon a written demand which his attorney testified he made upon Mrs. Abbott. This demand was in the form of a letter which the attorney wrote to her, and sent by mail to her address in New Jersey. It was in all respects sufficient in form to constitute a good demand. Mrs. Abbott denied having ever received it. The testimony of the attorney was to the effect that he wrote the letter, sealed it in an envelope, deposited it in the post office in New York, directed as above stated, and that it had never been returned to him. It is undoubtedly the presumption that a letter, properly mailed and addressed to the person at his or her place of residence, was received by such person. (*Oregon Steamship Co. v. Otis*, 100 N. Y. 446.) The learned court ruled, however, that the positive denial of Mrs. Abbott overcame such presumption. In this ruling we think the court was in error. Mrs. Abbott was a person interested in the event of the action, and it was within the province of the jury to reject her statement entirely. Consequently when the proof upon this subject was all in, it presented a question of fact which was for the jury to determine, and not the court. (*Kingsland Land Company v. Newman*, 1 App. Div. 1.)

The removal of the piano from the mother's house to the son's cannot be treated as a conversion as matter of law so as to dispense with the necessity for a demand. The proof shows, as we have seen, that the piano had been removed prior to the last removal, although no consent was obtained, and the vendor, with knowledge, raised no objection thereto. The jury might well say, in view of this circumstance, that there was waiver of this provision of the contract, and infer consent upon the part of the vendee that the piano might be removed as convenience or necessity dictated. There was nothing in the removal which indicated an intent to

secrete it or place it beyond the reach of the vendor or his successor in interest. The occasion for the removal was, or the jury might have so found, that the room at Mrs. Curry's was too small to conveniently keep it there, and that this was the only reason why it was removed.

The error above noted seems to require a reversal of the judgment and the granting of a new trial, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

VICTOR KOECHL, Appellant, v. LEIBINGER & OEHM BREWING COMPANY, a Domestic Corporation, and Others, Respondents.

*Creditor's suit—assignment made by a corporation after a fraudulent transfer of its property—assignee enjoined from disposing of property—authority for bringing the suit.*

A judgment creditor of a corporation, whose execution issued upon his judgment has been returned unsatisfied, may maintain an action in equity to set aside an assignment for creditors, made by the corporation after it had, with knowledge of its insolvency, already fraudulently disposed of a considerable part of its property among its officers and attorneys, and to secure payment of his judgment from the property of the corporation by virtue of the lien created by the issuing of the execution and the institution of the action.

In such a case the court considered that an injunction should be granted to prevent the assignee of the corporation from disposing of the proceeds of a sale of the corporate property, to the extent of the plaintiff's judgment, until the decision of the creditor's suit.

The right to maintain such a suit rests wholly upon the established rules of courts of equity, and not upon the provisions of article 1 of title 4 of chapter 15 of the Code of Civil Procedure.

APPEAL by the plaintiff, Victor Koechl, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 10th day of February, 1898, denying the plaintiff's motion to continue an injunction *pendente lite*.

*Frederic W. Hinrichs*, for the appellant.

*Moses Weinman* [*Samuel Untermeyer* with him on the brief], for the respondents.

HATCH, J.:

The defendant Leibinger & Oehm Brewing Company is a domestic corporation. Heretofore, and on the 19th day of May, 1897, it made and executed a general assignment, without preferences, for the benefit of its creditors, and the assignee therein named entered upon the discharge of his trust. Subsequent to his qualifying as assignee, he presented a petition to the Supreme Court asking leave to sell at public auction the whole of the assigned property. An order authorizing him so to do was made by the court, and the property was sold for the sum of \$55,000. The plaintiff is a judgment creditor of the defendant corporation, and he seeks by this action, begun some two months prior to the sale, to have the said assignment set aside as having been made in fraud of the rights of creditors, and for the purpose of hindering, delaying and defrauding such creditors in the due enforcement and collection of their demands.

The action is at issue and will soon be reached for trial. The injunction asked is for the purpose of restraining the defendant assignee from distributing the whole of the proceeds of the sale during the pendency of the action, and requires him to keep sufficient of the funds in his hands to satisfy the plaintiff's judgments in the event that he succeeds in the action, and establishes his right to have his judgment paid and satisfied out of the property of the corporation. The amount which the plaintiff asks that the assignee retain for this purpose is the sum of \$12,500. The plaintiff's judgments, independent of interest, amount to the sum of \$9,471.53. It is the claim of the plaintiff that the corporation was, at the time of the execution of the assignment, insolvent, and that it had been so insolvent for a long time prior thereto, to the knowledge of its officers, directors and attorneys; that being so insolvent its officers, directors and attorneys conceived a scheme to make a fraudulent disposition of a portion of its property by distributing the same among its officers and attorneys, and, after such distribution, to make and execute an assignment of its remaining property for distribution among its creditors, without preference; that in pursuance of such fraudulent purpose it delivered to its secretary bonds, owned by it, and secured by mortgage upon its property, in the sum of \$4,000, and to its attorneys a like number of the same series of bonds, of the same amount, secured by the same mortgage. Immediately

upon the transfer and delivery of these bonds it executed and delivered the assignment.

The plaintiff further claims that if he establish such facts upon a trial, he becomes entitled to have the assignment set aside as fraudulent, and to have the amount of his judgments satisfied out of the property of the corporation, without regard to the rights of other creditors, except such as have prior specific liens.

We shall, therefore, consider, in the first instance, whether the facts upon which the plaintiff relies establish a *prima facie* case of fraud; and, if so, whether the legal result which flows therefrom entitles the plaintiff to the preliminary injunction and to the application of the property in satisfaction of his judgments, if he succeed upon a trial in establishing his claim as averred in his complaint. In August, 1896, the plaintiff loaned to the corporation, by an exchange of checks, \$3,000. The plaintiff's checks were paid, but the corporation's checks remained unpaid, and plaintiff was requested by Moesmer, the secretary, and Leibinger, the president, not to deposit the checks, as they could not be paid. They were never paid, and now constitute the basis for two of the judgments averred in the complaint. In October, 1896, the plaintiff made a further loan of \$6,000, secured by the promissory notes of the corporation, payable upon demand. This loan was made to tide it over a difficulty, and at the time when it was made the plaintiff talked with the president and one of the directors about the affairs of the company, and stated to them that the company was probably insolvent, and had no chance of recovering itself. There is no denial of any of these statements or transactions by any of the defendants. Moesmer, the secretary, had also loaned the company during 1896, as he says, upwards of \$6,000, and this money was due and unpaid sometime prior to the assignment, and prior to the transfer of the bonds secured by the second mortgage. This evidence, when coupled with the fact that it was subsequently found necessary to make this assignment, and that the whole property sold for only \$55,000, is practically conclusive of the fact that the corporation was insolvent for nearly a year, at least, prior to its general assignment. (*Brown v. Montgomery*, 20 N. Y. 287; *Rasin v. Ammi-down*, 15 Hun, 422; *Toof v. Martin*, 13 Wall. 40.) Leibinger and Moesmer were respectively president, secretary and directors in

the corporation, and so remained at the time of the transfer of the bonds and the execution of the assignment. They must, therefore, have known of this condition of the corporation. At least, upon the papers now before us, it appears that they were cognizant of the transactions and of the inability of the corporation to pay its commercial paper. In the absence of explanation by the defendants, the plaintiff became entitled to have the court find that the corporation was insolvent at the time when the transactions were had.

The declaration of the defendant Moesmer that he had no idea that the company was insolvent when the bonds were delivered to him, in the absence of a denial upon his part of the facts above adverted to, is entitled to no consideration, as he is shown to have had knowledge of the transactions, the dishonor of the corporation's paper, and its inability to pay its debts. The papers further disclose that the property of the corporation was incumbered by a first mortgage for \$35,000 or \$38,000. In the spring of 1897 the corporation concluded to place a second mortgage upon its property, and by resolution of its stockholders authorized the board of directors to sell the bonds, "to maintain and extend the business of the company by securing tax certificates for customers, and in such other manner as they may consider to the interest of the company." This mortgage secured bonds to the amount of \$50,000. It is in dispute as to how many of these bonds had been issued prior to the execution of the assignment. The assignee has set out this mortgage, in the schedules, as constituting a lien for \$29,000, and in his petition to the Supreme Court for leave to sell the property, he stated that this mortgage was a lien for that amount.

It is the claim of the defendants that bonds to this amount were issued sometime prior to the execution of the assignment, and it is claimed by the plaintiff that \$8,000 of them were issued on or about the day of the assignment, and he avers that such issuance was a part of the fraudulent scheme. It is undisputed that upon the books of the corporation there appeared an entry under date of May 20, 1897, the day after the assignment, showing that Moesmer surrendered on that date certain past due notes of the corporation which he held, and that he received therefor four of the second mortgage bonds. The date in the book had been changed from May twentieth to May first, and the bookkeeper stated to the

attorney for the plaintiff that the change was made by Moesmer's direction after the assignment was made. There is no denial interposed by Moesmer of the date originally appearing in the book, nor of his direction to the bookkeeper to make the change; although he makes an affidavit, it contains no denial, except that he did not receive the bonds on May twentieth, but several weeks prior thereto, upon a date which he does not give. No denial is interposed by the bookkeeper or by any other person as to the statement made by him. In addition to this, Alfred E. Hinrichs testified that Moesmer informed him in an interview relating to the mortgage, had on May fourteenth, five days before the assignment, that this mortgage had been executed about three weeks before, and that only \$20,000 in bonds had been issued thereunder. Moesmer makes no denial of this statement.

Plaintiff brought his action upon the claims upon which he recovered judgments, and the summons was served upon Moesmer May 14, 1897. On the eighteenth, Moesmer, through M. Hallheimer, his attorney, served verified answers in four of the actions, containing a general denial and averring lack of consideration for the debt. At this time, as we have seen, Moesmer knew of the checks, and had long before requested the plaintiff to hold them, as they could not be paid if deposited. He had but a few days before written the plaintiff's attorney, admitting the liability of the defendant corporation and asking for further time. The plaintiff thereupon moved the causes on to the short cause calendar, and they were set for trial on the 7th day of June, 1897. On June first Moesmer withdrew his answers, and judgments were entered by default. There is no denial of these facts. We feel justified in observing that the reckless disregard of the obligation of an oath, evidenced by the verification of these answers, so far discredits Moesmer as to call for the rejection of all the statements contained in his affidavit, as being unworthy of belief, except so far as such statements may be corroborated by unimpeached testimony.

The papers in respect of the transaction with Untermeyer disclose the following: The minute book of the corporation shows that the firm of which Untermeyer is a member was under a general retainer of the corporation of \$500 per annum. Under date of May 19, 1897, the following resolution was passed by the board of directors,



consisting of Leibinger, Moesmer and one Schmolz: "*Resolved*, that the president is authorized to pay the charges of counsel in connection with the assignment, and to that end to pledge, hypothecate or dispose of such securities belonging to the company as may be necessary for that purpose." In connection with this resolution appear in the affidavit certain declarations of the president as to what securities were delivered in pursuance of this resolution. They are declarations made after the assignment, and in impeachment of it, and may not, therefore, be considered. We do, however, so far consider this matter as to be impressed with the view that Leibinger may be called as a witness upon the trial to testify as to the principal fact, and his evidence in this manner become available. It does not appear what securities were delivered under this resolution; but it does appear that on June 3, 1897, Untermeyer stated to plaintiff's attorney that there were but \$20,000 worth of second mortgage bonds outstanding, and that they were held by a Buffalo creditor. This statement Untermeyer does not deny. Untermeyer states that he had special charge of the business of the corporation, and had had for many months, and negotiated in the matter of procuring additional capital, for which his firm was to receive \$3,000, and he took the bonds in payment at seventy-five cents on the dollar.

It is quite evident that this corporation was for some time in so precarious a state that it would seem as if the person who negotiated in respect of its financial matters and had charge in that direction, must have obtained some knowledge leading him at least to think that the business was not prosperous, and the corporation of doubtful solvency. Untermeyer appears, from his own affidavit, to have been in a position to know, and the court could find, that the officers and attorneys knew that the corporation was in embarrassed circumstances for a considerable time before the assignment was made. In other words, that they then knew the facts which existed.

We come, therefore, to the law applicable to the case as we view the facts. Section 48 of the Stock Corporation Law (Laws of 1890, chap. 564) renders invalid any conveyance, assignment or transfer of the property of a corporation by any officer, director or stockholder, with intent to give a preference to any particular creditor over other creditors of the corporation. It has been held that this statute is effective in preventing a transfer, where the intent was to

give a preference. (*Milbank v. de Riesthal*, 82 Hun, 537.) It is quite evident that if the plaintiff can establish the averments of his complaint, the court would be authorized to find upon a trial that the intent to prefer existed at the time the transfers of the bonds were made.

It is claimed by the defendant that this action cannot be maintained and a preference secured over other creditors. This view proceeds upon the theory that, by the provision of the Code of Civil Procedure (Art. 1, tit. 4, chap. 15), no such action is authorized. This may be conceded. The answer is, however, that this is not an action under the Code. The claim here presented upon the part of the defendant is completely answered by the decision in *Easton Nat. Bank v. Buffalo Chemical Works* (48 Hun, 557, 561). That action, like this, was to remove an impediment which prevented plaintiff's judgments from becoming liens; and it was observed by Mr. Justice DANIELS, after showing that the provisions of the Code upon which the defendants rely had no application, that the action "depends wholly upon the established rules of courts of equity." The plaintiff in that action was defeated for the reason that he had not issued an execution upon his judgment and had it returned unsatisfied, which it was held was a condition precedent for the maintenance of the action. Here the executions were issued and returned unsatisfied. There is nothing said in *Home Bank v. Brewster & Co.* (15 App. Div. 338) which conflicts with this view. Judge WILLIAMS was then speaking of the remedies under the Code. He expressly says, "The general provisions of the Code, with reference to judgment creditors' actions, do not apply to such an action." This said what Judge DANIELS had before said, using different words and with more of amplification. This case not only does not support the contention of the defendants, but it is a distinct authority against them, not only as to the question of practice, but in the measure of relief to which plaintiff will become entitled if he succeed in his action, and that relief will be the payment of his judgments from the property of the corporation by virtue of the liens created by the issuing of the execution and the institution of his action. In this respect the case is in harmony with rules long settled and uniformly applied. (*Hammond v. Hudson River Iron & Machine Co.*, 20 Barb. 378; Pom. Eq. Juris. § 1415; *Edmeston v. Lyde*, 1

Paige, 637; *First Nat. Bank v. Shuler*, 153 N. Y. 163, 171.) It is not necessary that the assignee should participate in the fraudulent intent; it is sufficient if the intent of the assignors be fraudulent. (*Loos v. Wilkinson*, 110 N. Y. 195.) The filing of the claim by plaintiff with the assignee was not such a recognition of the assignment as operated to nullify his action. He had the right to act upon the defensive and protect himself at every point without subjecting himself to the penalty of having his action dismissed, unless he ratified the assignment by some unequivocal act. The mere attempt to protect himself as an alternative resort is not a proceeding under the assignment in such a sense as conclusively recognizes its validity. It is true that the assignment is valid upon its face, but this is no answer to plaintiff's claim, if the prior disposition of the property was fraudulent; otherwise it would be an easy matter to dispose of practically all of the property of a corporation by fraudulent preference, and then protect such acts by an assignment valid upon its face. The law tolerates no instrument which makes a shelter for fraud. It is quite true that courts upon appeal will not interfere with the exercise of a sound discretion by the court below, either in refusing or in granting an injunction; but where the court can see that the facts warrant the injunction, and it is not clear that the action of the court below was based upon a full consideration of the facts, or where it has disposed of the application upon an erroneous view of the law, the court will interfere and correct the error. In the present case either view may have obtained in the court below. And as the assignee may distribute the whole of the proceeds and leave nothing to answer plaintiff's judgment, if he succeed, we think a proper case was presented for the continuance of the injunction. We are also inclined to this view for the reason that only sufficient of the funds in the hands of the assignee is retained to meet the contingency of the suit which can be speedily tried, and little hardship will be worked upon any one.

The order should be reversed, and the motion to continue the injunction should be granted.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion to continue injunction granted, with ten dollars costs to abide the event. Motion to dismiss appeal denied, without costs.

JAMES L. REYNOLDS, Respondent, v. THE CITY OF MOUNT VERNON,  
Appellant.

*Salaried health officer — when not entitled to charge for services rendered to smallpox patients.*

The health officer of a municipality, whose board of health was given power by statute (Laws of 1892, chap. 182, §§ 220, 221) to prescribe regulations for vaccination; to prevent persons infected with contagious diseases from entering the city; to provide for the removal to a hospital or pest house of all persons suffering from, or who had been exposed to, contagious diseases, and to prescribe the duties of its health officer, personally attended a smallpox patient although authorized by the board of health, of which he was a member, to employ a special physician for that purpose, and also attended a similar patient of whom he was directed by the board to take charge.

*Held*, that he was not entitled to compensation, in excess of his salary, for such services on the ground that they were in addition to his official duties and were extra hazardous.

That such duties were within the scope of the duties devolved upon him by his employment, and in direct relation to the obligations growing out of the position which he held.

APPEAL by the defendant, The City of Mount Vernon, from a judgment of the County Court of Westchester county, entered in the office of the clerk of the county of Westchester on the 13th day of September, 1897, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

*William J. Marshall*, for the appellant.

*Isaac N. Mills*, for the respondent.

HATCH, J. :

The purpose of this action is to recover the value of certain medical services, claimed by the plaintiff to have been rendered at the instance and request of the defendant, in pursuance of a contract executed by it through its board of health. The board of health of the defendant which made the contract was created by the charter of the defendant (Chap. 182, Laws of 1892), section 220 of which provides that the board of health shall consist of the mayor, supervisor

and the health officer of the city. Such board of health is given power to prescribe regulations for vaccination, and the prevention of persons infected with contagious diseases from entering the city, and further to provide for the removal to a hospital or pesthouse of all persons suffering from, or having been exposed to, any contagious disease; to take charge of, inspect and regulate the rebuilding, construction and keeping clean all constructions or works affecting the public health, and generally possessing such powers as are conferred upon such boards. By section 222 of said act, such board is authorized to prescribe the powers and duties of the health officer in all sanitary matters, so far as the same shall not come in conflict with such officer's powers and duties as prescribed by general laws.

In March, 1894, the plaintiff as health officer reported a case of smallpox in the city, and thereupon the board of health adopted a resolution that "the health officer be instructed to employ a special physician, compensation not to exceed \$20.00 per day, also a nurse and two special officers, all to be quarantined, and to take such other action as he may deem necessary to isolate the disease." Acting under this resolution the plaintiff proceeded to isolate the person suffering from the said disease, and employed a physician as directed by the resolution. This physician not proving satisfactory, the health officer took charge of the case in person, and made thirty-five visits to the patient at the place of isolation, for which he charged five dollars a visit. Prior to this time, and on March thirteenth, he attended a case of confluent smallpox at No. 12 Stevens avenue, for which he charged twenty dollars. In July of the same year the plaintiff as health physician reported a case of smallpox, and also stated to the board that he would like to make what money there was in it; and thereupon the board passed a resolution that "the health officer be authorized to employ two watchmen, a trained nurse at \$5 a day, and attend to the case himself." In this case he charged for sixteen visits at \$10 a visit, amounting in all to \$160. His total bill, for which a judgment has been directed, amounts to \$355 and interest. At the time of the adoption of these resolutions the plaintiff was a member of the board, and so continued during the period of his attendance upon the cases. He did not vote upon the resolutions, but they were adopted by the other members of the board. At this time,

however, he was paid a salary of \$75 per month, which had been prior thereto fixed by the board. The judgment proceeds upon the ground that the services rendered by the plaintiff were additional to the duties devolved upon him as health officer, and being of an extra hazardous character, entitled him to extra compensation at the rates charged.

The statute under which the board acted does not specifically define the duties of a health officer, but the nature of his employment and the purpose of the creation of the office sufficiently designate the character of the duties which he is to perform; and we think that such duties embraced necessarily the character of service which was rendered in this case. And while the board of health undoubtedly had power to authorize the employment of other physicians and create a legal charge therefor against the city, so long as the statute remained in force under which it acted, yet we do not think that the officer himself could exact extra compensation for the service which he rendered, upon the basis that such service was extra hazardous. There was no employment by the board of health of the health officer in the first case; he took charge of that case upon his own motion. So far as the second resolution was concerned, by its very terms the duty of attending such case was devolved upon the health physician by the specific action of the board. They had the power under this statute to exact such service; and the plaintiff became bound to render it by virtue of his general employment, and could not exact extra compensation therefor. The case in this respect falls within the principle enunciated in *Cowan v. The Mayor, etc., of New York* (3 Hun, 632); *People ex rel. Phoenix v. Supervisors of New York* (1 Hill, 362). The fact, if such it be, that the city has, prior to this time, paid to another health officer extra compensation for such service, does not have the effect of creating a valid claim against the city for the services rendered by the plaintiff. Such is the conclusion of the court in the case last cited. Nothing which is contained in *MacDonald v. The Mayor* (32 Hun, 89) conflicts with this view. In that case the service which was rendered by the physician was in no sense within the range of the duties imposed upon him by his employment. On the contrary, the services rendered therein were for another officer in

another department, and such services had no relation whatever to, nor were they connected with, the duties devolved upon him by the position which he held. The difference between the two cases is quite radical. In the present case the duties of the plaintiff were devolved upon him by his employment, and had immediate and direct relation to the obligations which rested upon him growing out of the position which he held.

This leads us to the conclusion that no liability rested upon the city to make compensation for the service.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE LONG ISLAND MUTUAL FIRE INSURANCE CORPORATION, Respondent and Appellant, v. LOUIS F. PAYN, as Superintendent of Insurance, Appellant and Respondent.

*Mutual insurance companies — under what provision of the Insurance Law their right to continue business is to be determined by the superintendent — examiners' report.*

The question as to the continuance in business of a mutual insurance company is to be determined by the Superintendent of the Insurance Department under section 43 of the Insurance Law (Laws of 1892, chap. 690). Section 41 of that act does not apply at all, and section 118 applies only in part to a mutual insurance company.

The distinction, in this regard, between companies having "capital stock" and mutual insurance companies having only "assets or capital," considered.

*It seems,* that a mutual insurance company should not be allowed to continue in business, merely because it has some surplus of assets over liabilities.

The duties of examiners of a mutual insurance company and the proper contents of the report to be made by them to the Superintendent of Insurance, considered.

APPEAL by the defendant, Louis F. Payn, as Superintendent of Insurance, from a final order of the Supreme Court, made at the Suffolk Special Term and entered in the office of the clerk of the

county of Suffolk on the 4th day of October, 1897, confirming the report of a referee and directing that a peremptory mandamus issue.

Also, an appeal by the relator, The Long Island Mutual Fire Insurance Corporation, from so much of said order as denies the relator credit for moneys due from the Mechanics' Fire and Marine Lloyds for losses and for premiums paid the Mechanics' Fire and Marine Lloyds for reinsurance.

The order appealed from directed that a writ of peremptory mandamus issue, commanding the above-named defendant, as Superintendent of Insurance of the State of New York, to amend the report of the examiners appointed by him to examine into the condition of the above-named relator, by crediting on said report the said relator with assets of \$79,400 of capital stock notes, without making any corresponding charge as a liability against said company; also to amend said report by crediting said company with a sum of about \$4,800 for furniture, fixtures, etc., in the office of said company, and used by it in the prosecution of its business.

*J. Rider Cady*, for the appellant.

*Walter H. Jaycox*, for the respondent.

CULLEN, J. :

We know of no duty imposed by law upon the Superintendent of Insurance in regard to the subject-matter of this application, the performance of which is sought to be enforced by the writ of mandamus. Though this objection may have been waived by the appellant in the proceedings before the Special Term, we understand that he urges it on this appeal; and even were it now waived we should be unwilling to give effect to any concession of the parties and grant the writ of this court against a public officer to compel him to do that which no law makes it incumbent upon him to do.

In my opinion, neither the position taken by the appellant nor that maintained by the respondent, in regard to the statutory provisions as to the insolvency of mutual fire insurance companies, is correct. I think that section 41 of the Insurance Law (Laws of 1892, chap. 690) does not apply to the case of a mutual insurance company; neither does section 118 in its entirety. Otherwise, as substantially conceded



by the learned counsel for the appellant on the argument, the capital stock of every mutual company would be impaired instantly upon its organization and before it had lost a dollar or spent a dollar. Under his claim the cash paid in and stock notes would constitute the capital stock of the company; but, as such notes and cash are only received in consideration of policies of insurance issued to the makers of the notes, the unearned premiums would have at once to be charged against that capital, and thus the capital be impaired to the extent of those premiums. I think the case of the relator and of all mutual corporations is covered by section 43. The difference in the language of these two sections makes this apparent. Section 41 provides for a case where it appears that the capital stock of an insurance company is impaired. Section 43 provides for a case where the assets or capital of a mutual insurance company is insufficient to justify its continuance in business. This makes the distinction between a company having "capital stock" and a company having only "assets or capital" clear. In the case of a mutual insurance company there can be no impairment of the capital stock within the statute. A perfect protection for the public is provided. Whenever the superintendent deems the assets of a company insufficient to justify its continuance in business, the Attorney-General can proceed against the corporation.

The report of the examiners in the main, and with the exception of certain small items, states the condition of the relator correctly. It has \$20,214.17 cash assets and \$79,247.07 capital stock notes with a total liability of \$44,558.37. To the amount of the cash assets should probably be added an item of \$4,879.85 for furniture, stationery, etc., and it may be another item of \$1,710.99 for amount due from the Fire and Marine Lloyds. But the examiners were not compelled to do more than state the facts, and this they have done, except in the instances indicated. On these facts the superintendent is to proceed and determine whether the assets of the corporation, both cash and notes, over and above its liabilities, are insufficient to justify its continuance in business. This is the only determination to be made by the superintendent. There is no such thing as impairment of capital stock in the case.

But I by no means wish to be understood as holding that the relator or any mutual insurance company should be allowed to con-

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tinue in business indefinitely, merely because it has some surplus of assets over liabilities. If that were so, with a net dollar to its credit it might assume obligations to which, if the business proved unfavorable, it would have no means to respond. The question is one for the superintendent to determine when the net assets are too small to justify the company in going on.

The final order appealed from should be reversed and application dismissed, but without costs.

All concurred.

Final order reversed and application for mandamus denied, without costs.

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HARRY R. ELLIOTT and ALBERT L. BOUYON, Appellants, v. EUGENE VAN SCHAICK, Respondent.

*Decision of a motion to direct a verdict—exception thereto, how taken, when the decision is reserved—power of review by the appellate court.*

Where the decision upon a request made at the trial of an action by each of the parties for the direction of a verdict in favor of such party has, by consent, been reserved, if the unsuccessful party neither files, under sections 994 and 1185 of the Code of Civil Procedure, a notice of an exception to the decision of the court within ten days after its service upon him, nor appeals from the denial of a motion for a new trial, the appellate court has no power to review the correctness of the decision of the trial court in its direction of a verdict, but is limited to a consideration of the exceptions taken on the trial.

APPEAL by the plaintiffs, Harry R. Elliott and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 29th day of June, 1897, upon the verdict of a jury rendered by direction of the court.

*John Andrews, Jr.*, for the appellants.

*Van Schaick & Norton*, for the respondent.

PER CURIAM:

At the close of the evidence both parties requested the court to direct a verdict. By consent, the decision of these applications was

reserved ; subsequently the court directed a verdict for the defendant. Under the practice adopted, no exception could have been taken on the trial to the ruling of the court, for the decision was not made until after the close of the trial. Provision for such a case is made in sections 994 and 1185 of the Code of Civil Procedure, which authorize the unsuccessful party to file a notice of exception within ten days after the service of a copy of the decision of the court. The appellants have filed no exception to the direction of a verdict for the defendant. A motion for a new trial was made and denied, but no appeal was taken from the order made on that application. We, therefore, have no power to review the correctness of the determination of the trial court in directing a verdict for the defendant, but are limited to a consideration of the exceptions taken on the trial. (*Ainley v. Manhattan Railway Co.*, 47 Hun, 206 ; *Dixon v. Dixon*, 12 N. Y. St. Repr. 505.) The exceptions taken relate solely to the admission of evidence. The appellants in their brief have not argued them, and we think they are not well taken.

The judgment appealed from must be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

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DANIEL McCARTHY, Respondent, v. GEORGE HILLER, Appellant.

*Estoppel by judgment* — how far a matter must have been passed upon to preclude its consideration in a second suit.

The failure of a party who has obtained judgment in an action, brought by him to set aside a conveyance of real property alleged to have been obtained from him by fraud, to ask in that action for the recovery of the rents collected by the defendant while in the wrongful possession of the property, does not, in the absence of proof that the question of rentals was passed upon in deciding such action, or that the right of the owner to such rents was necessarily involved in the determination or merged in the judgment therein, estop him from maintaining a subsequent action against the defendant for such rents.

APPEAL by the defendant, George Hiller, from a judgment of the County Court of Kings county in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 11th day

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of July, 1897, affirming the judgment of a justice of the peace, and also from an order entered in said clerk's office on the 10th day of July, 1897, affirming the judgment of said justice of the peace.

*Louis J. Altkrug*, for the appellant.

*J. Worden Gedney*, for the respondent.

WOODWARD, J. :

In the year 1895 the plaintiff in this action was the reputed owner of a house and lot on Fulton street, in the city of Brooklyn, and the defendant claimed to own a house and lot at No. 141 Osborne street, in the same city. Both of these pieces of property were admitted to be incumbered, but taking values into consideration they were about equal, and an exchange was effected, the plaintiff delivering a warranty deed, with full covenants, the defendant doing likewise, and both parties entered into possession. Afterward the plaintiff discovered that there were certain liens upon the property deeded by the defendant, and he brought an action in the Supreme Court to have the Fulton street property restored to him, on the ground that the transaction was fraudulent. The facts were established on the trial, and the court rendered its judgment, directing that the deed conveying the Fulton street property should be canceled of record as fraudulent and void.

Some time subsequent to the securing of this judgment, the plaintiff began the action now under consideration, to recover the sum of \$135 for rentals collected by the defendant during the time that he was fraudulently in possession of the Fulton street property. The defendant answering admitted the facts alleged in the complaint, but pleaded as a defense that the matter having been previously before a court of competent jurisdiction, the plaintiff was estopped from bringing this action for further relief. There is, therefore, but one question to be determined, and that is whether the judgment in the action brought to restore the plaintiff to his rights in the Fulton street property, is a bar to an action for rentals collected by the defendant while in the fraudulent possession of the property of the plaintiff. It is urged in behalf of the defendant that the plaintiff having been before a court of equity, and having estab-

lished facts which would have justified the court in ordering an accounting for the rentals, a failure to ask for this relief is a bar to the present action; and in support of this contention the language of the court in the case of *Griffin v. Long Island Railroad Company* (102 N. Y. 449) is quoted as follows: "The rule is well settled that a former judgment of a court of competent jurisdiction is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to, or essentially connected with, the subject-matter of the litigation within the purview of the original action, either as matter of claim or of defense."

This language, if receiving no modification, might be deemed to be conclusive, and this court would be most reluctant to question the authority cited; but we find in the same case, and in the succeeding paragraph, that the court does not hold to this sweeping language, for it says that, "To ascertain what might have been determined in the former action, it is proper to look, beyond what appears on the face of the judgment, to every allegation which, having been made on one side and denied on the other, was at issue and determined in the course of the proceedings. (*Clemens v. Clemens*, 37 N. Y. 59.)"

It is not sufficient that the action should be between the same parties and in respect to the same property; it must be shown that the particular cause of action has been before the court, and that it was passed upon in arriving at the judgment of the court. Suppose for instance, that the defendant, while in the fraudulent possession of the property, had maliciously destroyed the plumbing or had removed the mantels or had materially deteriorated the value of the premises, which facts were unknown at the time of the pendency of the original action, would it be maintained that a previous adjudication of a controversy, in respect to the title, had disposed of an action for damages? Obviously the mere fact that an action has been determined between the parties which involved the same premises, is not a bar to an action to recover money which came into the possession of the defendant by reason of his presumed ownership of the property. "It is laid down," say the court in the case of *Clemens v. Clemens* (37 N. Y. 73), "as well settled, that the estop-

pel extends beyond what appears on the face of the judgment to every allegation which, having been made on one side and denied on the other, was at issue and determined in the course of the proceedings. (2 Smith's Leading Cases, p. 787; *Outram v. Morewood*, 3 East, 346, 355; *Stewart v. Hughes*, 7 Casey, 381.)"

"The burden of proof," continue the court, "is, of course, on those who rely upon the estoppel, and they must show that the matter now in controversy has been already heard and determined. When, however, it is made to appear, with sufficient clearness, that a transaction has undergone a judicial investigation, the presumption will be irresistible that the judgment covered the whole, so far as it was entire and indivisible, and cannot be overcome except by the clearest proof that no evidence was given as to that fact by the plaintiff, or that the defendant failed to take advantage of a defense that might have been available."

The principle is stated with even greater clearness in the case of *Embury v. Conner* (3 N. Y. 511), where the court say: "The general rule is that an allegation on record, upon which issue has been once taken and found and a judgment has been rendered, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found, whether it is plead in bar or given in evidence, when it is proper to be given in evidence." In the more recent case of *Pray v. Hegeman* (98 N. Y. 358) the court, speaking through Judge ANDREWS, say: "The general rule is well settled that the estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is for the purpose of the estoppel deemed to have been actually decided." That is, all collateral questions necessarily arising in the litigation are deemed to be merged in and determined by the judgment of the court; but this does not apply to questions which were not before the court

and which are, in themselves, sufficient to sustain a separate cause of action.

The same doctrine is emphatically asserted in the case of *Hopkins v. Lee* (6 Wheat. 109), and Herman's Law of Estoppel (§ 105) quotes with approval the language of another, that "A judgment estops the parties only as to the grounds covered by it and the facts necessary to uphold it. Parties are not allowed to prove what is inconsistent with its rectitude and justice, for while it stands unreversed it is final as to the points decided, but not in respect to matters which the record itself shows were not in question."

In the case at bar the defendant relies wholly upon the record of the judgment in the previous litigation; he makes no effort to establish the fact that the question now in dispute was under consideration, and the mere incidental mention of the fact that the defendant was collecting rentals, made in the pleadings, is not sufficient to warrant the presumption that the court passed upon the question now in issue in determining the previous litigation, or that the right of the plaintiff to recover was necessarily involved in the determination or merged in the judgment.

The order of the County Court, affirming the judgment, is affirmed.

All concurred.

Judgment affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. PETER REIDY,  
Relator, v. JOHN T. GRADY and Others, Constituting the Board  
of Police Commissioners of Long Island City, Respondents.

*Police—dismissal of a policeman for misconduct—a conviction must precede it.*

A police board, after hearing the proofs taken under charges made against a member of the force, entertained a motion to dismiss the charges, but never decided it, and thereafter, without finding the accused guilty of the offense charged, passed a resolution dismissing him from the police force.

*Held*, that the right to dismiss the accused depended upon his being found guilty of some offense, and that the mere passing of a resolution dismissing him, without finding him guilty, was without effect.

CERTIORARI issued out of the Supreme Court and attested on the 26th day of June, 1897, directed to John T. Grady and others,

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constituting the board of police commissioners of Long Island City, commanding them to certify and return to the office of the clerk of the county of Queens all and singular their proceedings in regard to the dismissal of the relator from the police force of Long Island City.

*George A. Gregg*, for the relator.

*Almet F. Jenks*, for the respondents.

WOODWARD, J. :

The relator was appointed a policeman of the city of Long Island City in 1883, serving continuously up to the 19th day of March, 1897, when he was removed from office, after a hearing before the police commissioners of that city upon two charges. These charges were: (1) "Disobeying of orders and neglect of duty," and (2) "Conduct unbecoming an officer, and making false returns."

The specifications were that the "said Patrolman Peter Reidy, of the second precinct, did, on or about the 4th of January, 1897, at Long Island City, neglect or refuse to serve subpoenas upon Timothy Carney, Mrs. Carney and daughter, or any of them, in the case of The People against John Fossman, although he had been personally ordered and directed so to do by his superior officer, Acting Sergeant Flanagan;" and that the said Reidy had made "a false and untrue return that he had on the 4th of January, 1897, at Long Island City, personally served subpoenas in the case of The People against John Fossman, on each of the following named persons, viz. : Timothy Carney, Mrs. Carney and daughter, by showing original subpoenas to, and delivering a copy thereof to, each of the said persons personally. Whereas, in truth and fact, he never served said subpoenas on any one of the said persons. That by reason thereof, Charles T. Duffy, justice of peace, was obliged or compelled to adjourn said case, owing to the absence of the said persons or witnesses."

On the trial, which took place on the 23d day of January, 1897, all of the police commissioners being present, there was no evidence introduced to show that the justice of the peace, or his court, had been in any wise inconvenienced by the alleged conduct of the relator, and that much of the charge is, therefore, entitled to no



consideration. It was clearly established upon the trial that the relator did serve the subpoena upon Mrs. Carney and daughter, and that after going twice to the house of Timothy Carney, and failing to find him, the relator, at the suggestion of Dennis Carney, a brother of Timothy Carney, left the subpoena with Dennis Carney, the latter agreeing to serve the same, as he afterward did, upon Timothy, the next morning. After delivering the subpoena to Dennis Carney, relator met Timothy Carney and told him that he had a subpoena for him, but that it was then in the hands of his brother Dennis, and Timothy replied that he would be on hand. The relator, relying upon the promise of Dennis to serve the subpoena, and following the usual custom, made out the formal papers declaring the service of the subpoenas upon all the parties to whom they were directed; and it appears from the record that Timothy Carney was absent from court, not from any lack of regularity in the serving of the subpoena, but because, after being out of employment for some time, he was given an opportunity to work, and in the contemplation of this employment he forgot to obey the summons.

At the close of the case the relator, through his attorney, moved to dismiss the charges upon various grounds, including a motion to dismiss the charge of failure to serve subpoenas on Mrs. Carney and daughter on the uncontradicted evidence that he had personally served them, and the decision of the commissioners was reserved until the stenographer's minutes were written up; and the motion was never granted. On the nineteenth day of March the record shows that the board of police commissioners held a meeting, and that the following resolution was adopted: "By Commissioner Jordan — Resolved, that said Patrolman Peter Reidy be and he is forthwith dismissed from the police department of Long Island City, its service and employ."

It does not appear that the board of police commissioners ever passed upon the motion to dismiss that portion of the charges which related to the service of the subpoena upon Mrs. Carney and her daughter, or that it ever found him guilty of this or any other part of the charges. In fact, the board of police commissioners, so far as the record shows, does not seem to have reached any determination except that the relator should be dismissed from the police department of Long Island City.

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This court is authorized, by section 2140 of the Code of Civil Procedure (Subd. 4), to determine "whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination," and we are of the opinion that there was no "competent proof" of any facts which justified the board of police commissioners of Long Island City in coming to the determination which was reached in this case, without first determining that the relator was guilty of some of the material offenses charged. The right to dismiss from the police service depends upon the conviction of the relator of some offense; he must be guilty of some infraction of the rules and regulations of the police department, or of the laws of the State, or his tenure of office cannot be disturbed; and the mere passage of a resolution of dismissal, after a hearing upon specific charges, without finding the relator guilty of some portion of the charges, is of no more effect than the same action would be without such hearing.

It is apparent, therefore, that there could have been no legal conviction of the relator of any offense which would have justified his removal, and we are forced to conclude that the action of the board of police commissioners of Long Island City was contrary to law and in derogation of the rights of the relator, and the determination should be annulled and the relator restored to his position as patrolman.

All concurred.

Determination annulled and relator reinstated, with fifty dollars costs and disbursements.

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CHARLES LUNDBECK, Appellant, v. THE CITY OF BROOKLYN,  
Respondent.

*Negligence — a person injured by falling, at night, over a stump in a city street —  
when proof of similar prior accidents is competent.*

In an action brought against a municipal corporation to recover damages for injuries sustained by the plaintiff in consequence of his falling, at night, over the stump of a tree which projected seven or eight inches above the surface of the ground in a city street, the court excluded the testimony of witnesses for the plaintiff that other persons had fallen over the same stump before the

accident, and in its charge instructed the jury that the plaintiff could not recover unless he established that the obstruction was one which was likely to prove dangerous, and that the defendant had constructive notice of its existence. *Held*, that the exclusion was erroneous, as the evidence excluded bore not only upon the question of constructive notice, but also upon the character of the obstruction, as constituting a menace to the safety of pedestrians.

APPEAL by the plaintiff, Charles Lundbeck, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 10th day of December, 1896, upon the verdict of a jury, and also from an order entered in said clerk's office on the 6th day of January, 1897, denying the plaintiff's motion for a new trial made upon the minutes.

*H. Kettell*, for the appellant.

*Alnet F. Jenks*, for the respondent.

WOODWARD, J. :

The plaintiff in this action is a physician. In making a professional call at 1379 Bushwick avenue, in the city of Brooklyn, on the evening of October 28, 1894, he is alleged to have fallen over the stump of a tree which stood seven or eight inches above the surface of the ground, and to have sustained permanent injuries, resulting in traumatic stricture of the urethra. On the trial of the action the plaintiff offered to prove, in addition to the facts immediately connected with the accident, that other persons had fallen at the same place, and, upon objection by the defendant, such evidence was excluded. The single question is presented, whether the court erred in excluding the testimony; if it did not, then the verdict in favor of the defendant must stand.

The record of the trial, in so far as it is material to this question, is as follows: The wife of the patient was asked: "Had you observed anybody fall over that stump before this accident? A. Yes, sir. Mr. Van Cott: I object, and move to strike it out. The Court: Yes, I exclude it. [Exception.] "

Thomas, a witness for the plaintiff, swore: "My attention was called, as I was passing, to a child that had fallen. Mr. Van Cott: I object to that, and move to strike it out. \* \* \* The Court: Strike it out. [Exception.]"

The admissibility of this kind of evidence is hardly open to question; it has been held repeatedly that it was competent for the plaintiff to show, in an action for damages growing out of the neglect of municipalities, that similar accidents had happened at the same point and were due to the same causes. This was held in the case of *Quinlan v. City of Utica* (11 Hun, 217); affirmed by the Court of Appeals (74 N. Y. 603), and cited with approval in the case of *District of Columbia v. Armes* (107 U. S. 519), and this court, in the case of *Cohn v. New York Central & Hudson River R. R. Co.* (6 App. Div. 196), recognized the same doctrine in the declaration that: "It is doubtless competent to show that horses or persons frequently caught their feet at a crossing, or continually slipped on a sidewalk, to show that the crossing or sidewalk was in a dangerous condition. \* \* \* In the cases taken as examples, evidence of the character stated would constitute evidence of the defendant's negligence, for it would be negligence to maintain a crossing or sidewalk in such condition as to endanger persons passing over it."

We will assume, therefore, that it was proper, in the case at bar, to have admitted the evidence offered in behalf of the plaintiff, and pass to the consideration of the question whether or not it was error for the court, under the particular circumstances of this case, to refuse to admit it. It is urged with much plausibility on the part of the defendant that the evidence of the plaintiff established the fact of a dangerous obstruction; that if the stump was actually in the highway, standing six to eight inches above the surface of the street, and such obstruction remained there a sufficient length of time to give constructive notice of the fact, a condition was established "from which the jury must infer that a person stumbling against it in the dark could fall and injure himself. So far as the dangerous condition was concerned, it could not make a particle of difference to the jury whether some one else had fallen over it or not, for it is patent on the face of it that a stump standing up from the sidewalk from 6 to 8 inches is a dangerous obstruction upon which anybody is liable to stumble at night." This contention would have greater weight if it appeared at any time in the trial that the defendant was willing to concede what it now asserts as a self-evident proposition. The burden of proving all of the material allegations was upon the plaintiff; it was necessary for him to estab-

lish affirmatively that the place where the accident occurred was dangerous, and that it had remained in that condition long enough for the defendant to have constructive notice of the fact; and to this end he was clearly entitled to show, by the experience and the observations of others, that this stump had not only been there, but that it had been the cause of other people stumbling. The fact that the jury might assume or infer that such accidents might occur from a given state of facts is no evidence that they would, in the absence of testimony, arrive at such a conclusion.

Had the court, in its charge to the jury, instructed them that the question of notice was not in the case, or that the character of the obstruction was not in issue, it might be that this court would be justified in saying that the finding of the jury would not have been modified or changed by the refusal of the court to admit the evidence offered; but this is not the case. The court, after refusing this evidence, charged the jury that, "If you find that this stump that was in the street was of that character that you say, that in the exercise of ordinary prudence and attention the officials of the city would not have presumed that it was likely to produce any such result as this, then you can convict the city of no neglect of duty in leaving it there. If, on the other hand, considering its height from the ground and its size, you are able to say that it was an obstruction in the street which, in the exercise of ordinary care, the city, under its duty to remove obstructions, should have removed, why then you are able to say that the city was guilty of a neglect of the duty cast upon it by law in respect to this plaintiff and all the rest of us. If you are able to say that, in the exercise of ordinary prudence, the officials of the city having the streets in charge should have said that this was an obstruction over which people were likely to trip and stumble, and hurt themselves, why then you are able to say that the city did not use care in keeping the street reasonably safe for those who had a right to be there." Again, the court said, "I can only say to you that there are many ways for people to hurt themselves in the streets and elsewhere for which nobody would be liable. I can only say to you it is not for every little defect in the sidewalk, or for every little obstruction that the city would be liable, because, as you look around in the streets of cities and in highways, you observe that such things do exist. Therefore, the question with

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the jury, calling upon their best judgment and experience in life, is to say whether the particular thing brought into court was something which was likely to produce the injury which is complained of here. Unless you are able to say that, the city is exonerated."

In the very opening sentence the court say: "The gravamen or gist of this action, gentlemen, is an allegation by the plaintiff that he was injured through the neglect solely of the city, and he must make that out in order to recover. It is not enough that he stumbled in the street, or stumbled over something in the street, to enable him to recover in this action. He may not recover unless what happened to him was caused by the neglect of the city in some particular as to which the law imposed a duty upon it."

In still another paragraph the court charges: "But, gentlemen, where a thing exists for a time so long that a jury is able to say that, in the exercise of due care and attention and inspection of the streets, the city should have known of it, you may proceed just as though it did in fact know of it. If it had existed there such a length of time that you are able to say that the city, through the eyes of its employees and officers, should, in the exercise of ordinary care and attention, have known that it did exist, then I say to you again that you may then proceed just as though somebody had gone and notified them that it was there."

In view of this charge, emphasizing to the jury the necessity of the plaintiff's establishing constructive notice, together with the character of the obstruction, it was clearly error for the court to deny the plaintiff the right to introduce evidence showing that other people had stumbled over the same obstruction. Evidence of this character was calculated to establish the length of time this obstruction had remained, and of the opportunity which had been afforded the city of knowing of its existence; it was equally important in establishing the character of the obstruction, and the probabilities of its operating to produce the result which is alleged to have been produced in the case at bar; and it is no answer to this proposition that the jury might have inferred this from the evidence already before them.

The court charged that the plaintiff must establish that the injury resulted from the negligence of the defendant; and an obstruction which was so located that the chances of stumbling over it would be

very remote, would not show the same degree of negligence, or the same want of care, that would be manifest in a case where the obstruction was such that it was causing frequent accidents. For instance, had this stump been located very near to a standing tree, where the person approaching it would have notice of the greater obstruction, it might remain for a generation without constituting that degree of neglect which would entitle the plaintiff to recover, and yet he might have suffered the same accident through inexcusable carelessness on his own part. It would have been competent for the defense to have shown such a condition of facts, had they existed, and it was equally competent for the plaintiff to show that the stump was so located that it was a constant menace to the safety of pedestrians, and to this end it was proper to show that others had stumbled over this stump while in substantially the same condition as that which existed at the time of the accident.

The order appealed from is reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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SAMUEL ROSENBLATT, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

*A street railroad company—it has a paramount right to that part of a street in which its rails are laid, between intersecting streets.*

The cars of a street railroad corporation have a paramount right to the use of that portion of the street occupied by their tracks which lies between intersecting streets.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the County Court of Kings county in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 28th day of October, 1897, upon the verdict of a jury for \$1,300; and also from an order entered in said clerk's office on the 27th day of October, 1897, denying the defendant's motion for a new trial made upon the minutes.

*John L. Wells*, for the appellant.

*James D. Bell*, for the respondent.

WOODWARD, J. :

This action was for damages for personal injuries sustained by the plaintiff in a collision between one of the cars of the defendant company and a wagon of which the plaintiff was the driver. It appears from the evidence that, on the 4th day of November, 1895, the plaintiff was engaged in delivering certain goods to the customers of the Fleischmann Yeast Company, in the city of Brooklyn, and while on Harrison avenue, between Wallabout and Gerry streets, he undertook to drive across the street in front of an approaching car, and in the collision which followed he was thrown from his wagon, falling in such a manner that his horse fell upon him, causing a dislocation of the hip and other injuries. On the trial of the cause the evidence clearly established the facts connected with the accident, though there was some conflict of testimony as to the distance of the car and the rate of speed at which it was running at the time the plaintiff undertook to cross; and there is but one question involved in the appeal which it seems necessary to consider.

The court, in charging the jury, neglected to state the rights of the parties in the highway, or rather to draw distinctly the line of relative rights, and the defendant requested the court to charge that where the accident occurred (which was at a point between two streets) the defendant had a paramount right to the use of the street where the track was laid. This request the court refused, and the defendant duly excepted. In this we are clearly of opinion that the court below was in error. Street railroad companies, while organized for private profit, are yet instituted for the convenience of the public, and it is necessary, in the accomplishment of this higher object, that the cars of the company shall be operated with the least delay and greatest regularity consistent with the safety of the community. Confined by the necessity of their construction and mechanical appliances to a particular part of the highway, public policy demands, and the law sanctions the doctrine, that these companies shall be given the paramount right to that portion of the highways



which is taken up by their tracks, and which is between intersecting highways. This rule, while absolving the company from none of the obligations to use that caution which is required in guarding against collisions, is necessary to the discharge of that duty which the company owes to the community, and imposes upon the individual the duty of observing a greater degree of caution than would be necessary if the superior rights of the public did not intervene, requiring the operation of vehicles propelled by mechanical appliances, and running as a part of a system reaching all parts of a great city, and affecting business interests throughout the State.

This rule is put strongly in the negative in the case of *Fleckenstein v. The Dry Dock, East Broadway & Battery R. R. Co.* (105 N. Y. 655), where the court, speaking through EARL, J., say: "The trial judge did not err in charging the jury that the defendant did not have the exclusive right to the use of its tracks, but simply the paramount right. Street railways have the lawful right to put their tracks in streets and run their cars thereon. Their cars are confined to the tracks, and cannot turn out to avoid obstacles thereon. Hence, they have the right of way and persons lawfully driving upon the same tracks must not recklessly, carelessly or willfully obstruct the passage of their cars. But such persons are not absolutely bound to keep off or get off from the tracks; they must fairly and in a reasonable manner respect the paramount right of a street railway; and if they do this, and without any fault on their part they are injured by carelessness or fault chargeable to the railway, the law affords them a remedy by action for damages."

"But," say the court, in the case of *McClain v. Brooklyn City R. R. Co.* (116 N. Y. 465), "as a street car must continue on the rails of its track, persons otherwise traveling on the street are required to use care to keep out of its way, yet for their protection the duty rests upon the driver to keep his horses reasonably within his control upon the public streets."

The same doctrine is asserted by the court in the case of *Fenton v. The Second Avenue R. R. Co.* (126 N. Y. 625). "Street railway cars," say the court, speaking through Judge EARL, "have a preference in the streets and while they must be managed with care so as not to carelessly injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way."

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This case is distinguishable from the case of *Huber v. Nassau Electric Railroad Company* (22 App. Div. 426), where the plaintiff was crossing the defendant's track in the line of an intersecting street, it being held that, under such circumstances, the defendant's car had no paramount right of way.

This being the law, it was the duty of the trial court to have so stated at the request of the defendant, and because this request was denied, the judgment and order of the court below is reversed and a new trial granted, the costs to abide the result of the action.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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GEORGE H. McLEAN, Appellant, v. HELEN M. H. SANFORD and JOHN A. ROOSEVELT, Executor and Trustee under the Will of CATHARINE L. BUTLER, Deceased, ELIZABETH TEN EYCK STUYVESANT, ANNIE E. STUYVESANT and WILLIAM C. HUDSON, Respondents.

*Mechanics' liens — the time to file a lien is not extended by slight repairs ordered and made four months after the completion of the original contract — repairs ordered by a tenant who is to be made an allowance for them out of the rent — they are made with the consent of the owner.*

The statutory period of ninety days after the completion of a contract, within which a mechanic's lien must be filed, cannot be extended by proof that, about four months after the work had been done, and after the contractor had taken a note for a balance due for such work, the contractor was ordered to make a very slight repair which was not made in continuance of the original contract. *It seems*, that where a lease stipulates that the tenant may retain, from his own rent and that of another tenant payable to him, a definite amount for repairs and renovations, repairs made in pursuance thereof, to the extent in cost of the limit fixed, are made with the consent of the owner within the meaning of the Mechanics' Lien Law (Laws of 1885, chap. 342, § 1, as amended by the Laws of 1888, chap. 316).

APPEAL by the plaintiff, George H. McLean, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Dutchess on the 26th day of

December, 1895, upon the decision of the court rendered after a trial before the court without a jury dismissing the complaint.

This action was brought to recover the amount of a mechanic's lien filed by the plaintiff's assignor against premises belonging to the defendants other than the defendant William C. Hudson.

*A. M. & G. Card*, for the appellant.

*Milton A. Fowler*, for the respondents.

Judgment affirmed, with costs, on the opinion of Mr. Justice BARNARD at Special Term.

All concurred.

The following is the opinion of Mr. Justice BARNARD :

BARNARD, J. :

William C. Hudson took a lease from the Stuyvesant heirs of their place in Hyde Park, known as Edgewood, for the term of three years, from the 1st of May, 1893. The tenant was to pay \$1,100 a year monthly in advance. A part of the premises was rented by the heirs to Mr. Mund for agricultural purposes at the rent of \$325, payable June 1, 1893. The Mund lease began to run the 1st of April, 1893, and Hudson was to be entitled to the rent from Mund. By the Stuyvesant lease to Hudson the tenant was to do certain work at his own expense, but Hudson was empowered to do certain other work termed "repairs and renovations" in his own discretion, and the owner was to allow him a sum not exceeding \$500. This sum was to be taken from the Mund rent and the first two months of the Hudson lease. The plaintiff's assignor did plumbing work and furnished material to the amount of \$543.23; all this work was completed on the 3d of June, 1893. On the 1st of June, 1893, Hudson asked him for the bill in duplicate, so as to turn in one of the copies to the owners. On the 6th of June, 1893, the plumber took a note from Hudson at three months' time for the sum of \$543.23. When the note matured \$100 was paid on it by Mr. Hudson, and the note renewed for another three months for the balance. Twenty dollars has been paid on this latter note, and the remainder is unpaid. When the first note was given, Mr. Hudson had in his hands \$508.33, made

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up of the Mund rent and the May and June rent in advance under the lease to him.

There can be no reasonable doubt that these repairs were done with the consent of the owner under chapter 342, Laws of 1885, as amended by chapter 316, Laws of 1888. (*Burkhitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 90 id. 336; *Cowen v. Paddock*, 137 id. 188.)

Mr. Hudson was not a contractor within the meaning of the lien act. He was rather the agent of the owner to make such repairs as he wished to make, but limited as agent by the owner to the amount of \$500. There was no privity of contract between the owner and the claimant, but such privity is not called for by the act under the written consent of the owner.

The remaining question is whether the lien was filed in time. The lienor had ninety days in which to file the lien from the 3d of June, 1893. On the 29th of September, 1893, Mr. Hudson requested the lienor to put the furnace in order for the winter. This was an old furnace, and needed a water glass of the value of twenty-five cents, which, with the labor, amounted to one dollar and fifteen cents. This need was not anticipated when the work was done in the spring, and was not in continuation of any work done upon the furnace then.

Mr. Doherty, the lienor, knew of the \$500 limitation, or ought to have known of it. (*Spruck v. McRoberts*, 139 N. Y. 193.)

The limitation had been reached before the small charge was made almost four months thereafter, and after the preceding account had been adjusted and settled, and Hudson's note taken for it.

There was, therefore, no continuous contract by which the prior account can for the purpose of filing a lien be deemed as continuous. (*Duffy v. Baker*, 17 Abb. N. C. 357.)

For the reason, therefore, that as to the old bill the lien was not filed in time, and as to the September item it was not furnished under the consent of the owner, the complaint should be dismissed, with costs.

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DETERMINED IN THE  
**FIRST DEPARTMENT**  
IN THE  
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OTTO GERDAU, Respondent, *v.* EBERHARD FABER, Appellant.

*Action against a director for a failure to file an annual report — leave to serve an amended answer — merits of the proposed answer not considered — laches in making the application.*

Upon an application made by a director of a corporation for leave to serve an amended answer, setting up the Statute of Limitations as a defense to an action brought against him because of the failure of the corporation to file an annual report, the court will not pass upon the merits of the proposed defense.

Where it appears that the board of directors has attempted to comply with the statute, the action being penal in its nature, the court will not be strenuous to deny the application upon the ground of *laches*.

APPEAL by the defendant, Eberhard Faber, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of January, 1898, denying his motion for leave to serve an amended answer.

*Francis Forbes*, for the appellant.

*Marshall B. Clarke*, for the respondent.

VAN BRUNT, P. J. :

This action was brought to enforce a liability for the indebtedness of a corporation against the defendant as director, because of the failure of the corporation to file an annual report. The case was at issue for some time, and a motion was made for leave to serve an

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amended answer, setting up the Statute of Limitations. This motion was resisted upon the ground of *laches*, and also because such statute would be no defense.

Upon this appeal we do not think that we should pass upon the question of the merits of the defense. Whatever question there may be in that respect should be raised upon the trial, so that either party may take an exception and be able to review the action of the court upon appeal.

As to the question of *laches*, it does not seem to us that the motion should have been denied upon that ground. There had been an attempt upon the part of the board of directors to comply with the statute. The defendant's liability, if any, arises because of a want of compliance with the formal requirements of the statute, and although the defendant may not have made his motion at the earliest opportunity, still, the action being penal in its nature, if he has any defense he ought to be allowed to introduce it.

The order appealed from should be reversed, with costs, and the motion granted upon payment by the defendant of the costs of the action up to the time of the making of the motion, and upon his stipulating to allow the plaintiff to discontinue the action without costs, in case he should be so advised.

BARRETT, RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order reversed, with costs, and motion granted upon payment by defendant of the costs of the action up to the time of the making of the motion, and upon his stipulating to allow the plaintiff to discontinue the action without costs, in case he should be so advised.

In the Matter of the Application of THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS OF THE CITY OF NEW YORK, for the Appointment of Three Commissioners to Determine whether a Rapid Transit Railway or Railways, for the Transportation of Persons and Property, as Determined by said Board, ought to be Constructed and Operated.

*Rapid Transit Act — right of the court to impose conditions upon confirming the report of its commissioners — conditions of the bond required.*

In view of the fact that the Appellate Division has an absolute right to refuse to confirm the report of the Supreme Court rapid transit commissioners of the city of New York, it has power to confirm such a report subject to certain conditions imposed by it as to the security to be required of the contractor for the protection of the city.

The former determination of the Appellate Division, that the contractor be required to give the city a bond for \$15,000,000, it was considered should be reaffirmed as to the amount, but that \$14,000,000 of the bond should be conditioned upon construction and equipment, and that \$1,000,000 should be a continuing security applicable to construction, equipment, rents, maintenance and operation.

INGRAHAM, J., dissented.

APPLICATION upon the part of the Board of Rapid Transit Railroad Commissioners for reargument or modification, and application upon the part of certain property owners for the settlement of the order upon the decision of the Appellate Division, heretofore rendered.

The opinion written upon such decision appears in 23 Appellate Division, 472.

*Albert B. Boardman* and *Edward M. Shepard*, for the Board of Rapid Transit Railroad Commissioners.

*George Zabriskie* and *Cephas Brainerd, Jr.*, for the property owners.

VAN BRUNT, P. J. :

It is claimed, upon the part of the Board of Rapid Transit Railroad Commissioners, that the court had no power to require that certain conditions should be complied with prior to its giving its consent to the construction of the road by confirming the report of the Supreme Court commissioners.

As the court has the authority absolutely to refuse to confirm that report for any reasons which might seem to it to justify such action, it is difficult to see why it has not the power to require that certain things shall be done which, in its judgment, are a necessary prerequisite to its confirmation of such report. It was the exercise of precisely this power by the common council and the General Term in 1884, when consents were given for the construction of the Broadway surface railroad, below Fifteenth street, which resulted in the present receipt by the city of a sum annually exceeding in amount the interest (at the rate at which the city borrows money) upon three or four times the then claimed value of the franchise; and the imposition upon the company of the obligation in respect to repairing the streets and keeping the same free from snow and ice. Prior to the confirmation of the report of its commissioners in that case the General Term exacted the execution of an agreement upon the part of the corporation to conform to these requirements, and, after the execution of such agreement, the report of its commissioners was confirmed. There would seem, therefore, to be no doubt in regard to the power of the court, and the only question remaining to be considered is as to whether there should be any modification in reference to the amount of the bond required by the original decision.

It is apparent, upon an inspection of the application of the Board of Rapid Transit Railroad Commissioners, that the security proposed to be taken by them is clearly inadequate to protect the city from the loss of a large part of the money it might advance towards the construction of the road in the event of the failure of the contractor to complete and equip the same.

It is suggested by the board that the deposit by the contractor of \$1,000,000 in cash or its equivalent, pursuant to the statute (which is to be returned to the contractor upon the construction and equipment of the road); the withholding of a reasonable percentage of the price of construction to be paid to the contractor *only* upon completion and equipment; a bond or several bonds to secure construction and equipment but not rental, the total amount of such bonds not to exceed \$7,500,000; a lien upon the equipment to be furnished by the contractor pursuant to the statute, and, lastly, a bond under section 34 of the Rapid Transit Act (Laws of 1891, chap. 4, as amended by Laws of 1895, chap. 519) in an amount which,



with the cash value of the equipment shall be equal to the estimated rental for seven years, would be the proper security to be given by the contractor to the board.

It is apparent that the bond last mentioned, upon the basis suggested, would be a mere nominal bond. Assuming that the road could be constructed for \$30,000,000, as estimated by the board, the aggregate rental would not much exceed \$7,000,000, and as the cost of equipment would be from \$7,500,000 to \$12,000,000, there would be no excess of rental over the cost of equipment to make up the penalty of the bond.

In respect to the withholding of a reasonable percentage of the price of construction until completion and equipment, we are in no way informed as to what the commissioners think would be such reasonable percentage; and it will be apparent upon a moment's reflection that such a system of security is the most onerous to the contractor and of the least benefit to the city, that can well be devised, because it is requiring the contractor to put up security in cash, when, by the giving of a proper bond, he might attain the same object by credit. In respect to the city, the security would increase in proportion as the work progressed, and would be the greatest when it would be least needed, namely, when the construction and equipment were completed; whereas, the city needs the greatest protection from the failure of the contractor to carry out his contract of construction in its earlier stages.

The only other question that it is necessary to consider is as to whether the amount of the bond required by the Appellate Division is excessive. I think that it will be seen, when we consider the obligations of the contractor, that if he, after entering upon the work, abandons the contract, \$15,000,000 would be insufficient to put the city in the same position which it would have occupied had he completed the contract. The cause of such abandonment will only be for the reason that the cost of construction is much greater than the contract price which the city is required to advance, and the only way in which the city can receive any benefit from the millions of money which it will have embarked in this enterprise, will be by the completing of the work itself—which will necessarily be at a cost to it largely exceeding the contract price, and this difference the sureties upon the bond should supply.

Furthermore, the only money which the contractor is to put into the enterprise at his own risk is that required for the equipment of the work after construction, upon which the city is to hold a lien to secure the provisions of the contract, which will then be those as to rent, maintenance and operation. It is estimated that this equipment will cost at least \$8,000,000. In the event of the failure of the contractor, and of the city being compelled to complete the construction, this equipment will also have to be furnished by the city, and the amount expended therefor will be chargeable against the bond. It is thus at once seen that the indemnity exacted is not only not excessive, but would not in reality save the city from loss in case of the failure of the contractor to complete, if it occurred in the early stages of construction. The \$7,000,000 of the bond remaining after providing for equipment, would undoubtedly be more than swallowed up by the increased cost of construction, if the city were compelled to complete.

It is undoubtedly true that the city will be largely protected as to rents, maintenance and operation by the lien which is given to it by statute upon the equipment to be furnished by the contractor. But it is imperatively necessary that it should have adequate protection by way of security in the matter of construction and equipment.

There is no difficulty in the giving of a bond with several conditions and limited obligations. We are of opinion that the conditions of the bond should provide that \$14,000,000 of the bond should be conditioned upon construction and equipment, and that \$1,000,000 should be a continuing security, applicable to construction, equipment, rents, maintenance and operation; and that such bond may be executed by two or several persons or corporations, each bound for at least \$500,000 of the penalty, and justifying according to the statute.

We do not see how any adequate protection can be furnished to the city without the execution of security such as above required.

RUMSEY and PATTERSON, JJ., concurred; INGRAHAM, J., dissented.  
INGRAHAM, J. (dissenting):

I dissent, upon the ground that the report should not be confirmed.

Application denied, conditions of stipulation settled as stated in opinion.

D. BUCHNER & Co., Appellant, v. EDWARD J. H. TAMSEN, as Sheriff  
of the City and County of New York, Respondent.

LOUIS ETTLINGER, Indemnitor, Respondent.

*Action against a sheriff—executors of his indemnitors cannot be substituted in his  
stead—the statute construed in analogy to the common law.*

The provisions of section 1421 of the Code of Civil Procedure, permitting the court, upon the application of the sheriff, to grant an order substituting his indemnitors in his place as defendants in an action brought against him, do not justify the substitution of executors of the estates of deceased indemnitors—the statute, being in derogation of the common law, should, when susceptible of two interpretations, be construed when practicable in conformity with it.

In any event the procedure to collect a judgment from an estate being very different from that obtaining in the collection of judgments against individuals, the substitution of the executors of deceased indemnitors in place of the sheriff in such a case would be an improper exercise of power by the court.

APPEAL by the plaintiff, D. Buchner & Co., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of February, 1898, resettling an order entered in said clerk's office on the 10th day of January, 1898, which granted the defendant's motion to substitute in his place one indemnitor and the executors of the estates of two deceased indemnitors, and also from the refusal of the court to resettle the said order of January 10, 1898, in the form proposed by the plaintiff.

*Franklin Bien*, for the appellant.

*Charles L. Kingsley*, for the sheriff, respondent.

*Albert W. Venino*, for the indemnitor, respondent.

VAN BRUNT, P. J. :

On or about the 24th of December, 1896, in an action in the Supreme Court in which Martin H. Lehmaier and others were plaintiffs and David Buchner was defendant, a warrant of attachment against the property of said Buchner was duly issued and directed to the defendant as sheriff of the city and county of New York. By virtue of such attachment the defendant levied and attached certain goods and chattels. The plaintiffs claimed the same,

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and thereupon said Lehmaier caused to be made and executed an undertaking to indemnify the said sheriff for the detention thereof by Albert Sichel, Louis Ettlinger and Julius Ehrman as sureties. This action was subsequently brought against the sheriff to recover \$50,000 damages claimed to have been sustained by the plaintiff by reason of the alleged detention of the property levied upon as aforesaid. The sureties Sichel and Ehrman having died, the only surviving indemnitor was Louis Ettlinger. The defendant, the sheriff, in December, 1897, made a motion to substitute the surviving indemnitor and the executors of the estates of the two deceased indemnitors, which motion was granted, and an order entered thereupon. Subsequently this order was resettled, and from the resettled order and from an order refusing further resettlement this appeal is taken.

It seems only to be necessary to consider one proposition. The statute substituting indemnitors (Code Civ. Proc. § 1421) is in derogation of the common law, and as was said in *Hayes v. Davidson* (98 N. Y. 22) "If the terms in which it is couched are susceptible of two interpretations, that one ought to be adopted which conforms most nearly to the rules of the common law and encroaches least upon the individual rights affected by it." The provision is that, where application is made by the sheriff, the court shall grant an order substituting the *indemnitors* as defendants in the action in the place of the officer. In consequence of the death of the two indemnitors this it is impossible to do. The executors of the estates of the deceased indemnitors were not indemnitors. The liability of the principal falls upon them as administrators of his estate, but they can in no sense be called indemnitors. The mere fact of their having been mentioned in the bond of indemnity gave no greater scope to the bond than if it had been silent in that respect. The indemnitor binds his estate by the execution of the bond; but his estate does not thereby become a party to the bond. His executors did not become indemnitors, because they did not execute the bond and could not have bound the estate if they had so done. It seems to be clear, therefore, that the court was not justified in substituting the liability of the estates of the deceased indemnitors for that of the sheriff.

Even if it had the power it seems to us that it would have been an

improper exercise of such power upon the part of the court, as the procedure to collect a judgment against estates is very different from that which obtains in respect to judgments against individuals. The language used in *Hayes v. Davidson* (*supra*) is again apt: "The cases must be rare when any useful purpose can be served by depriving a party of his lawful remedy against the individual who injured him, and compelling him to litigate his demands with persons who were not apparently participants in the wrong out of which the action arose, and as to whose liabilities and their extent many embarrassing questions may arise."

The order should be reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

BARRETT, RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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HERMAN H. SCHWIETERING and LOUIS WURSTER, Respondents, v.  
JUSTUS ROTHSCHILD and JACOB SCHWAB, Defendants; DAVID J.  
LEES, Receiver, etc., Appellant.

*Replevin — requisition set aside where the affidavit insufficiently describes the property sought to be replevied.*

An affidavit, upon which a requisition in replevin is issued to a sheriff, which gives no description of the property sought to be replevied beyond certain references to some pieces and numbers of yards and other unintelligible numbers, is clearly defective under section 1695 of the Code of Civil Procedure and the requisition should be set aside.

APPEAL by the defendant, David J. Lees, receiver, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of December, 1897, denying his motion to vacate and set aside a requisition in replevin on the ground of the insufficiency of the affidavit in relation to the description of the property sought to be replevied.

*Franklin Bien*, for the appellant.

No appearance for the respondent.

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VAN BRUNT, P. J.:

The affidavit upon which the requisition was issued was clearly defective. Section 1695 of the Code of Civil Procedure requires that the affidavit to be delivered to the sheriff must particularly describe the chattel to be replevied. The affidavit does not describe the property. It simply refers to some pieces and numbers of yards and other unintelligible numbers. There is nothing whatever to designate the property, or to indicate to the sheriff what property was to be taken under the writ. It is necessary that this provision should be complied with in order that the sheriff should be informed by the papers presented to him as to the particular property which he is called upon to seize, and that other creditors may be informed as to the claims sought to be asserted by the plaintiff in the replevin action.

We think that the affidavit utterly failed to comply with the provisions of the Code above referred to, and that the motion to set aside the requisition should have been granted.

The order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

STELLA A. MARSHALL, as Sole Executrix, etc., of SARAH DRAKE,  
Otherwise Called SARAH MERLE, Deceased, Respondent, v. ALFRED  
DE CORDOVA, Appellant, Impleaded with Others.

*Misappropriation of trust money — an action for its recovery is an equitable action — the misappropriation only need be proved by the plaintiff — defense of its repayment or of a release rests on the defendant — notice — inquiry required.*

An action brought by the executrix of an estate to recover from a firm of stock-brokers money which a temporary administrator of the estate previously appointed had lost in speculations conducted through that firm, on the ground that the firm had knowledge that the money so used was trust money, is equitable in its character — the plaintiff being entitled to an accounting for such money, and, if profit has been made, to such profit, and, if a loss has resulted, to the sum of money thus misappropriated, with interest.

IN such a case, whether the action be deemed one at law or in equity, a demand is not a necessary preliminary to its maintenance. The plaintiff in the action is only bound to establish the fact that the trust money has been misappropriated; and a defense that the right to recover it has been lost by its repayment, or by a release or otherwise, is an affirmative defense to be alleged and proved by the defendant.

The receipt by the brokers of a check drawn on a bank by a customer "as trustee" and deposited with the brokers in an account with this customer "as trustee," and proof that a subterfuge to withdraw the money from the category of trust funds was resorted to by a repayment of the money by a check drawn by the brokers to the trustee, who immediately deposited the proceeds of such check with the brokers, were considered to be sufficient evidence of notice on their part of the trust character of the money; and an inquiry made, after the money had been embarked in the speculation, by a member of the firm, of the trustee only, was held to be an insufficient discharge of the duty of investigation imposed by such notice.

APPEAL by the defendant, Alfred de Cordova, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 6th day of July, 1897, upon the decision of the court rendered after a trial at the New York Special Term.

*Thomas G. Shearman*, for the appellant.

*Samuel Greenbaum*, for the respondent.

VAN BRUNT, P. J. :

This action was brought by the executrix of the will of Sarah Drake, or Merle, to recover \$5,000 and interest which it was claimed one Robert P. Noah, temporary administrator of Mrs. Drake's estate, had misappropriated, and which the defendants had received with notice that it was a trust fund improperly applied. Noah had been appointed temporary administrator of the above estate and had received some \$10,500 in cash which he had deposited in bank. Out of this money, on the 10th of October, 1881, Noah, in his name as trustee, opened a speculative account with the firm of Alfred de Cordova & Co., who were stockbrokers doing business in the city of New York. Upon that day he deposited with said firm a check for \$5,000 drawn by him as trustee upon the Merchants' Exchange National Bank to the order of the firm. On the eleventh of October the defendants bought for account of Robert P. Noah, trustee, 500 shares of New York Elevated Railroad Company stock

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at a cost of \$54,962.50, and on the seventeenth or eighteenth of October sold the same, realizing the sum of \$55,437.50; making a profit upon the account of \$417.55, after deducting interest and commissions. About the same time there was purchased for his account 500 shares of the Denver and Rio Grande stock, costing about \$43,000. A day or two after this purchase Mr. de Cordova asked Mr. Noah for some explanation in respect to this account; and he testifies that Noah told him that "the money was his own; that he wanted to make some trades and wanted to enter it as trustee only upon one ground so that it could not be touched in any way by little indebtednesses that he owed around." It further appears that upon the same day a check was drawn for the amount to the credit of Noah as trustee by the defendants upon the Bank of the State of New York, which was indorsed by Noah as trustee, and according to his own testimony he did not get the money upon the check, but the proceeds were placed with the defendants to his individual credit. Noah's speculation in the Denver and Rio Grande stock subsequently proved disastrous, and he was sold out and all the money was lost. The will of the said Sarah Drake having been duly admitted to probate, and the plaintiff having qualified as sole executrix, this action was brought some six years afterwards.

Upon the trial of the action, at the opening of the case, it was urged that the complaint did not state a cause of action and should be dismissed, among other grounds stated, for the reason that there was no allegation that Noah had failed to account for the money which he had received. This objection is not well taken. It having been established that the money deposited with the defendants by Noah belonged to the estate of which he was a temporary administrator, under circumstances which imputed notice to the defendants of the origin of the money, when the estate claims its own money which had been received wrongfully by the defendants, it would seem that the burden was upon the latter to show that such payments had been made as absolved them from accounting to the estate for its property which they had wrongfully received. It is true that the counsel for the defendants cites the case of *Gray v. Farmers' Exchange Bank* (105 Cal. 64), which seems to conflict with this view. But no authority in this State has been produced



which imposes any greater obligation upon a party whose money has been misappropriated by the act of its servant than to establish the fact of such misappropriation, with the knowledge of the party receiving it. The defense that the right to such money has been lost, either by payment by the servant, or release, or otherwise, is an affirmative defense which it is necessary for the defendants to allege and prove.

It is also claimed that the complaint was defective because no demand was alleged. Of course, if this action is to be considered as one in equity, no demand was necessary. If an action at law, neither was any demand essential to its maintenance. Notwithstanding the claim of the defendants' counsel that the receipt of the money in question was not wrongful *ab initio*, no other conclusion than that it was wrongful *ab initio* can be arrived at. The defendants knew, at the time they received this money, that it was trust money, or, at least, they were put upon inquiry, and no inquiry whatever was made until after the money had been at the risk of this Denver and Rio Grande speculation, which resulted in a loss, and then inquiry was only made (according to the testimony of the defendant de Cordova himself) of Mr. Noah. That he did not believe Mr. Noah's statement is evidenced by the subterfuge which was resorted to in order to take the money out of the category of trust funds by going through the form of payment to Noah as trustee; handing over the check to him with one hand and receiving back the proceeds of it with the other. No inquiry whatever was made where any information might be procured. But it is said that inquiry at the bank would have resulted in no information. This is not made to appear. Consequently, we have the defendants receiving the money under such circumstances as to put them upon inquiry, and making inquiry only from the party who was endeavoring to perpetrate the fraud upon the estate which he represented. The complaint seems to have been sufficient, therefore, whether we consider the action as one at law or in equity.

It is further urged that the proof was defective, in that there was no legal evidence that the defendants received any money from the Drake estate. It seems to us that the conclusion of the learned judge below was amply justified by the evidence introduced. It appears that Noah received \$10,500 in cash belonging to the estate,

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and that a part of this money was used by him in this transaction, which was represented by the check of \$5,000 signed by him as trustee. The criticism upon the unreliability of Noah's testimony seems to be equally applicable to the testimony of the defendant, who was examined upon this trial as a witness. He, shortly after the transactions now under consideration, was examined as a witness in respect to that transaction, and made statements which do not precisely harmonize with those made upon this trial.

It is also urged that the addition of the word "trustee" to the check was not such a notice of a trust as to put the defendants upon inquiry. The case of *Gerard v. McCormick* (130 N. Y. 261) seems to lay down a different rule, and the cases therein cited clearly establish a different rule. Furthermore, it appears from the examination of the defendant de Cordova, made shortly after this transaction, that he knew this money was trust money, and desired to change the account for that reason, and went through the form above described of changing the account, which shows, not only that the defendants received the money under circumstances putting them upon inquiry as to the money being a trust fund, but that they knew the fact at the time. Under such circumstances, it is not necessary for us to discuss the question as to whether proper inquiry was made.

As to the question of *laches*, we are of opinion that, as long as an action is brought within the period allowed by the Statute of Limitations, the right to maintain the same is not lost by mere lapse of time.

The only remaining question necessary to be discussed is as to the right to a trial by jury. It seems to be apparent that the action in question was equitable in its nature. The defendants had wrongfully received trust funds, and the estate to which it belonged had a right to receive the principal and all the increase which had resulted from its use. The plaintiff, therefore, had a right to an accounting in respect to this money. If a profit had been made she would have been entitled to such profit. If the result of the speculation was a loss she was entitled to recover the principal and interest. Clearly a cause of action of an equitable nature. Therefore, there was no right to a trial by jury. And even if the action be deemed an action at law the defendants lost their right to a trial by jury by not making their demand in time. Upon the trial the

counsel for the plaintiff had opened the case, and the counsel for the defendants had made a motion to dismiss the complaint upon the ground that it did not state any cause of action. This motion was denied, and then came the question of a trial by jury. It seems to us that the rule is that before the commencement of the trial if a party desires to avail himself of the right to a trial by jury he must make his demand, and not in any manner proceed with the trial. In the case at bar, as already stated, the case had been opened and a motion made to dismiss the complaint, and the defendants took the risk of that ruling as part of the trial before making their demand for a jury. This was too late. The case of *The People v. The Albany & Susquehanna Railroad Company* (57 N. Y. 161) in no way conflicts with this rule. In that case the plaintiffs set forth several causes of action, as they claimed, all of which but one were equitable, if anything. It was in their power to waive the legal claim set forth and press only those which were equitable. Whether they would do so or not the defendants had no means of knowing until after reading the pleadings. The plaintiffs rested without calling any witnesses. It was then for the first time apparent that the plaintiff relied on the legal claim in respect to the title of the defendants to the offices in question. It was at this stage that the right to a trial by jury was claimed, and the court held that it was error to refuse it -- a case essentially different from the one above.

The judgment should be affirmed, with costs.

BARRETT, RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

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MOSES PRICE, Respondent, v. JACOB LEVY and Others, Appellants.

*Appeal — to authorize a review of a decision made under Code Civ. Proc. § 1022, an exception must be filed.*

Unless an exception is filed to a decision, made under section 1022 of the Code of Civil Procedure, the Appellate Division cannot, on an appeal from the judgment entered on such decision, review any question of fact.

APPEAL by the defendants, Jacob Levy and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the

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office of the clerk of the county of New York on the 9th day of June, 1897, upon the decision of the court rendered after a trial at the New York Special Term setting aside a judgment entered upon a confession and all proceedings taken thereunder, upon the ground that the confession was made, judgment entered and proceedings taken with intent to hinder, delay and defraud creditors.

*Max D. Steuer*, for the appellants.

*William A. Goodhart*, for the respondent.

PER CURIAM:

The appellants did not observe or file an exception to the decision of the Special Term upon which the judgment appealed from was entered, and they are, therefore, not in a position to challenge the conclusion reached by that court. (*Millar v. Larmer*, 85 Hun, 313.) Where a decision is made under section 1022 of the Code of Civil Procedure, an exception to the decision is necessary to present anything for review. No exception having been taken to the decision, there is nothing for the appellate court to review, and the judgment entered upon it must be affirmed. (*Smith v. Moulson*, 88 Hun, 147.)

It follows that the judgment must be affirmed, with costs and disbursements.

Present — VAN BRUNT, P. J., PATTERSON, O'BRIEN, INGRAHAM and McLAUGHLIN, JJ.

Judgment affirmed, with costs.

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NOTE. — The rest of the cases of this term will be found in the next volume, 27 App. Div. — [REP.]



# DECISIONS

IN

## CASES NOT REPORTED IN FULL.

FIRST DEPARTMENT, FEBRUARY TERM, 1898.

**Wynkoop, Hallenbeck, Crawford Company, Appellant, v. The Albany Evening Union Company, Respondent.**—Order reversed and motion granted to the extent indicated in opinion, with ten dollars costs and disbursements of appeal, and ten dollars costs of motion to abide the final event.—Appeal from order denying motion for bill of particulars.—

**PER CURIAM:** While it is apparent that the plaintiff is not entitled to a bill of particulars to the extent demanded by it upon the motion which was denied, yet it appears upon a reading of the answer that it is entitled to be apprised with greater particularity than is therein contained, as to some of the alleged fraudulent practices charged against it. We think that the motion for a bill of particulars should have been granted to the extent of requiring the defendant to furnish (1) a list of the bills presented to the Comptroller referred to in the answer, containing false and fraudulent charges; (2) the title of the reports in which paper was used in violation of the contract; (3) the title of the reports required to be printed which were not printed by plaintiff, but printed elsewhere, and (4) the matters from which, by reason of the delay and failure of the plaintiff to execute its contract, the State got no service. The order should be reversed and the motion granted to the extent indicated in this opinion, with ten dollars costs and disbursements of appeal, and ten dollars costs of motion to abide the final event. Present—Van Brunt, P. J., Barrett, Patterson, Ingraham and McLaughlin, JJ.

**William W. Brauer, Appellant, v. The Oceanic Steam Navigation Company, Limited, Respondent.**—Order modified by directing service of an unverified bill of particulars within twenty days after no ice of entry of order on this appeal, and by striking from the order entered at Special Term the 3d paragraph thereof. As so modified, order affirmed, without costs to either party.—Appeal from order granting bill of particulars.—

**PER CURIAM:** We think it was entirely proper to order a bill of particulars as to the items mentioned in the 1st and 2d paragraphs of the order, but it seems to us that the items of profits which the plaintiff claims he could have realized on the cattle mentioned in the complaint, should not have been required to be stated in the bill of particulars. No sufficient time was given to the plaintiff in which to furnish such bill of particulars, and he should not have been required to furnish a verified bill. The order should, therefore, be modified by directing the service of an unverified bill of particulars within twenty days after notice of the entry of the order upon this appeal, and by striking from the order entered at Special Term the 3d paragraph thereof. As so modified, the order should be affirmed, without costs to either party. Present—Van Brunt, P. J.,

Barrett, Rumsey, O'Brien and McLaughlin, JJ.

**Stephen W. Goodwin, Appellant, v. Albert L. Thompson, Respondent.**—Order modified as directed in opinion, and as modified affirmed, without costs to either party.—Appeal from order granting motion for bill of particulars.—

**PER CURIAM:** The order appealed from should be modified by striking therefrom the following clause: "Of what consists the duress referred to in said sixth paragraph of the complaint and the time and place connected therewith and the fear of what mischief to the property of the plaintiff and to his interests and himself he claims in said sixth paragraph of the complaint to have influenced him." As so modified the order should be affirmed, without costs to either party. Present—Van Brunt, P. J., Barrett, Rumsey, O'Brien and McLaughlin, JJ.

**Richard D. Harris, Respondent, v. George Elliott and George L. Elliott, as Executors, etc., of John Elliott, Deceased, and Others, Appellants.**—Order affirmed, with ten dollars costs and disbursements.—Appeal from order denying motion to compel plaintiff to pay money into court.—

**PER CURIAM:** Upon a former application the defendants sought to obtain a summary direction to the plaintiff to pay them the sums of money, and endeavored to enforce such direction by proceeding against the plaintiff for a contempt. In affirming the order denying the motion, this court held (*Harris v. Elliott*, 19 App. Div. 60) that the defendants' remedy was either to proceed in the pending suit or bring an action on the stipulation. The only difference between the present and the former motion is that, in this, instead of asking payment directly to them, they ask that the same sums be paid into court. Such a difference is not, however, one of substance, as they are asking here for substantially the same relief, namely, upon a motion, to secure the payment by the plaintiff of the money in a summary way. We think the defendants are concluded by our decision on the previous application; and though some misapprehension was created in the mind of the learned judge below in disposing of the application, as shown by his opinion, we think the conclusion reached by him was right. The order appealed from should be affirmed, with ten dollars costs and disbursements. Present—Van Brunt, P. J., Barrett, Rumsey, O'Brien and McLaughlin, JJ.

**Daniel Kramer, Respondent, v. Ernst A. T. Bjerrum, Appellant.**—Appeal dismissed, without costs.—Appeal from order denying motion for new trial.—

**PER CURIAM:** A new trial having been granted upon the appeal from the judgment, it is not necessary to consider this appeal. The appeal should be dismissed, without costs to either party. Present—Van Brunt, P. J., Rumsey, Ingraham and McLaughlin, JJ.

David J. Lees, as Receiver, etc., of Rothschild & Schwab, Respondent, v. John Dobson and Others, Defendants; Herman H. Schwietering and Louis Wurster, Appellants.—Order affirmed, with ten dollars costs and disbursements.—Appeal from order denying preliminary injunction herein.—

PER CURIAM: In this case the plaintiff is receiver of the firm of Rothschild & Schwab, and as such he represented not only the members of that firm but also all the creditors. The case is, therefore, precisely within the principle established in the case of *National Park Bank v. Goddard* (181 N. Y. 494), and must be controlled by the rules laid down in that case. The order should be affirmed, with ten dollars costs and disbursements. Present—Van Brunt, P. J., Rumsey, Ingraham and McLaughlin, JJ.

John A. Roebbling's Sons Company, Appellant, v. Alvin J. Belden and John A. Seely, Respondents.—Order affirmed, with ten dollars costs and disbursements.—Appeal from order denying plaintiff's motion for judgment on the pleadings for a portion of the claim alleged to have been admitted by the amended answer.—

PER CURIAM: We see no reason for interfering with the order as granted by the court below. There is undoubtedly a misstatement contained in the plaintiff's complaint, wherein he alleges the plaintiff to be a foreign corporation organized and existing under and by virtue of the laws of New York. It is apparent that it was the intention to allege that the plaintiff was a foreign corporation, and that it had complied with the laws of this State in reference to doing business within the State. The statute provides that no foreign corporation doing business in this State without the certificate mentioned therein shall maintain any action in this State on any contract made by it in this State until it shall have procured such certificate. In order to show a right to maintain the action, the plaintiff alleged a compliance with the laws of the State of New York in respect to foreign corporations. It is entirely immaterial for the purpose of the disposition of this motion whether it was or was not necessary for it to allege such compliance as a condition precedent to its maintaining the action. Having made the allegation and presented the issue, the defendant by denying it became entitled to have that issue disposed of before a recovery could be had against him. It is undoubtedly true that the denial in reference to the existence of the plaintiff as a foreign corporation is insufficient; but the denials of the other allegations as to the plaintiff's right to maintain the action raised an issue which the court could not disregard. The order appealed from should be affirmed, with ten dollars costs and disbursements.

Helena Flint, Respondent, v. Eleanor M. Ruthrauff, Appellant, Impleaded with The Second National Bank of the City of New York.—Judgment affirmed, with costs, on the opinion in the court below.—The following is the opinion in the court below:

CHASE, J.: This action presents a question of fact only. In the spring of 1885 Miss Ruthrauff advertised in the *New York Tribune* offering her services as professor of music for a home through the summer months. The plaintiff answered this advertisement, and an arrangement was made by which Miss Ruthrauff remained with Miss Flint through the summer months, teaching Miss Flint's little cousins. Miss Ruthrauff then ceased teaching, but continued to live with Miss Flint and keep house for her and was her companion. They became very warm friends. Miss

Flint made to Miss Ruthrauff an allowance, at first, of \$10 per month, and afterwards of \$50 per month. While their relations were very friendly and intimate, they were both intelligent and experienced women, and there is no evidence of any intention on the part of either to take advantage of the other. In the spring of 1889 Miss Flint made her will, in which will she gave to Miss Ruthrauff a legacy of \$25,000 absolutely. Miss Flint testifies that she told Miss Ruthrauff of the provision she had made for her, and, referring to Miss Ruthrauff, further says: "She was very grateful, and immediately assured me that the money would never go to her family or any one related to her; if she should survive me she should leave it to my relatives on her death." This statement on the part of Miss Ruthrauff was a voluntary statement, and the will does not appear to have been made pursuant to any prior understanding with regard to what disposition Miss Ruthrauff should make of the legacy in case of her death. Miss Ruthrauff made her will about the same time, of which Miss Flint had knowledge, by which will she gave all her property to Miss Flint, but nothing whatever is said in her will in regard to the disposition of the property in case of Miss Flint dying before her death. In case of the death of either after the making of their wills, the legacy in the will of the survivor would have lapsed. There were talks between Miss Flint and Miss Ruthrauff thereafter regarding the will and in regard to possible objections being made to the will by Miss Flint's relatives, and in December, 1890, Miss Flint testified she took from her box at the Lincoln Safe Deposit Vault \$10,000 of Tennessee Coal and Iron Company's bonds and gave them to Miss Ruthrauff to put in her box, saying: "These bonds are provisionally for you in case of my death. You may have the coupons and deposit them to your credit at the bank. I shall cease paying you the allowance, and the coupons will take the place of those payments." Miss Flint further testifies as follows: "Miss Ruthrauff was profuse in her thanks—moved to tears by my kindness, as she says—and assured me then, as in the case of the will, that if she survived me the bonds or their value would go to my relatives, or those among them who were in need of the money." From that time Miss Flint ceased to pay the allowance, and Miss Ruthrauff had the coupons. Miss Flint further testifies that on the 22d day of December, 1890, they were again at the Lincoln Safe Deposit Vault, and that she took \$10,000 of Brooklyn Elevated bonds and \$5,000 Richmond and Danville bonds from her box, and they were put in Miss Ruthrauff's box, and at the time stating that "the bonds were also provisionally for Miss Ruthrauff in case of my death; that she could not have the coupons as I needed them for household expenses. I could only afford to pay her \$600 a year, the coupons must be given to me. And then I said that I should destroy the will in which I had left her \$25,000, and that was soon after destroyed." Miss Flint, referring to Miss Ruthrauff, further says: "Upon receiving them she again expressed her gratitude and immediately assured me, as in the other cases, that if she survived me the bonds or their value would never go to her family or relatives; that she would leave them to me." On this 22d day of December, 1890, Miss Flint made and delivered to Miss Ruthrauff a paper, as follows:

"This twenty-second day of December, 1890 (December 22, 1890), I give to my friend Eleanor M. Ruthrauff twenty-five thousand dollars (\$25,000) in bonds and have [the

word have scratched] now place the bonds in her box. HELENA FLINT."

Miss Flint in a few days thereafter made a new will, leaving out the legacy to Miss Ruthrauff. Miss Flint continued to collect the coupons on the \$15,000 of bonds. In the spring of 1894 the Tennessee Coal and Iron bonds were replaced with bonds of an equal amount of Western Union collateral trust, and the Richmond and Danville bonds were replaced by an equal amount of Metropolitan Elevated. With Miss Flint's knowledge they were all registered in the name of Miss Ruthrauff. The whole object and purpose of these gifts was to protect and benefit Miss Ruthrauff and make her more certain to receive the \$25,000 in case of Miss Flint's death before the death of Miss Ruthrauff. The statements made by Miss Ruthrauff on receiving these gifts were voluntary statements, and the gift was in no way dependent upon such statements. According to Miss Flint's testimony the gifts were made to depend upon her, Miss Flint, dying before Miss Ruthrauff. They were "provisional." The writing of December 22, 1890, is absolute on its face, but it was only intended for protection to Miss Ruthrauff in case of Miss Flint's death before Miss Ruthrauff's death. In case Miss Flint died before Miss Ruthrauff, she undoubtedly intended the gift to be without condition, and that the paper, absolute on its face, should be used as evidence of her intention without qualification. Miss Ruthrauff says the bonds were all given to her at one time and in her room and not at the Lincoln Safe Deposit Vaults. Miss Flint may be mistaken with respect to this. Miss Ruthrauff's testimony shows that she accepted the gift with the understanding or qualification that Miss Flint should have the income, except as to the extent of her allowance. All the occurrences prior to 1896 as well as the letters of Miss Ruthrauff to Miss Flint indicate a continued recognition of the right of Miss Flint to assert some authority over the disposition of the bonds. I am satisfied from the whole testimony that Miss Flint intended to make and did make to Miss Ruthrauff a valid gift of the bonds, subject to the income on the \$15,000 being retained by her during her life and subject to the gift being entirely defeated in case of Miss Ruthrauff's death occurring before her death, and that a trust was created to carry out such intention. A judgment may be entered appointing the Union Trust Company trustee, to take and hold all the bonds and pay the income on the \$10,000 Western Union collateral trust bonds to Miss Ruthrauff during her life and on the other \$15,000 of bonds to Miss Flint for life. In case Miss Ruthrauff dies before Miss Flint the principal to be paid to Miss Flint, and in case Miss Flint dies before Miss Ruthrauff the principal be paid to Miss Ruthrauff. Miss Ruthrauff, at her option, may hold these bonds on giving a bond to Miss Flint in the sum of \$25,000 with surety or sureties to be approved by a justice of this court conditioned to carry out the provisions of the judgment to be entered herein. No costs are allowed except the sum of fifty dollars allowed to the defendant Second National Bank to be paid by the defendant Ruthrauff.

Henrietta T. Blatchford v. Willis S. Palne.—Motion dismissed, with ten dollars costs.

Ernest Girardin, Respondent, v. Metropolitan Street Railway Company, Appellant.—Judgment affirmed, with costs. No opinion.

Mary Hughes v. New York College of Dentistry.—Motion granted, with ten dollars costs.

Harry B. Harris, an Infant, by Henrietta Harris, his Guardian ad Litem, Respondent, v.

Third Avenue Railroad Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Maurice P. Jossaers v. Alva S. Walker.—Motion denied, with ten dollars costs.

James Keegan v. John Smith, Impleaded, etc. Dennis McMahon v. The Same.—Motion granted, certifying that a question of law is involved which ought to be passed upon by the Court of Appeals.

Morris Lefkow, an Infant, by Marks Lefkow, his Guardian ad Litem, Respondent, v. Abraham Roossin, Appellant.—Judgment affirmed, with costs. No opinion.

In the Matter of the Board of Education.—Motion denied, with ten dollars costs.

The People of the State of New York ex rel. Lorenzo Howell, Relator, v. Oscar H. La Grange and Others, Composing the Board of Fire Commissioners of the Fire Department of the City of New York, Respondents.—Writ dismissed, with costs. No opinion.

The People of the State of New York ex rel. James McPike, Relator, v. Theodore Roosevelt and Others, Composing the Board of Police Commissioners of the Police Department of the City of New York, Respondents.—Writ dismissed, with costs. No opinion.

Pocantico Water Works Company v. Joseph M. Low.—Motion denied upon payment of ten dollars costs.

John C. Ross, Respondent, Impleaded with James Flack, as Sheriff, etc., v. Robert H. Ingersoll and Charles H. Ingersoll, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Annie Stelker v. Ernst Plath.—Motion denied, with ten dollars costs.

Louis Ullman v. Paul Salvin.—Motion denied upon payment of ten dollars costs, to enable appellant to move in court below to open default.

Wynkoop, Hallenbeck, Crawford Company, Respondent, v. The Albany Evening Union Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. Edward D. McLaughlin, Relator, v. Frank Moss and Others, Commissioners Composing the Board of Police of the Police Department of the City of New York, Respondents.—Writ dismissed, with costs. No opinion.

Arena Athletic Club, Respondent, v. William L. McPartland, sued as "Kid" McPartland, and Jack Everhart, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Eliza M. Kiernan, Respondent, v. Edward Fox, as Administrator, etc., of Patrick Fox, Deceased, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of Myron Angel and Another.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Application of Joseph Marcus Rice, to Compel the Payment to him of the Legacy Contained in the Last Will and Testament of Mary A. Edison, Deceased.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Application of Nancy M. Harper to Compel the Payment to her of the Legacy Contained in the Last Will and Testament of Mary A. Edison, Deceased.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Frederick L. Colwell v. Charles A. Tinker.—Motion granted, with ten dollars costs.

Elizabeth S. Van Beuren and Others, Appellants, v. Sarah Lazarus and Others, Respondents.—Motion denied, with ten dollars costs.



Elizabeth S. Van Beuren and Others, Appellants, v. Frances A. Wotherspoon and Others, Respondents.—Motion denied, with ten dollars costs.

William Dehon King and Others, Respondents, v. Eugenia A. Webster Ross, Appellant.—Motion denied, upon payment of ten dollars costs, to enable appellant to move in court below to open default.

Matthew C. Kervan v. J. Allen Townsend.—Motion denied, with ten dollars costs.

In the Matter of William S. P. Prentice.—Motion denied, with ten dollars costs.

Arcangelo Capasso v. Edward G. Woolfolk and Another.—Motion denied, with ten dollars costs.

Arthur L. Leshner and Others, Appellants, v. Paul Salvin and Henry Lichtig, Defendants; Leopold Haas and Others, Respondents.—

Order affirmed, with ten dollars costs and disbursements, on the case of *Rouse v. Haas*, decided February 11, 1898 (see *ante*, p. 171).

Henry Zeltner v. George H. Irwin.—Motion denied, with ten dollars costs.

Mary E. Smith v. Charles C. Bradhurst et al.—Motion denied, upon payment of ten dollars costs, to enable appellant to move in court below to open default.

Nathan Abrams, an Infant, v. August Weiners.—Motion granted, with ten dollars costs.

Alexander A. Richmond v. Edward D. Mandell et al.—Motion granted, with ten dollars costs.

In the Matter of James Brady, Deceased.—Motion granted, with ten dollars costs.

The People of the State of New York ex rel. Michael J. McDonald, Appellant, v. Frank Moss and Others, Composing the Board of Police of the Police Department of the City of New York, Respondents.—Writ dismissed, with costs. No opinion.

Bridget M. Butler, Appellant, v. John McCormick, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Henry D. Steers and John A. Bensei, Composing the Firm of Steers & Bensei, Respond-

ents, v. The Standard Structural Company and The Hudson Building Company, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Rollin Tracy, Appellant, v. Livingston Jaques, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. Christopher Quinn v. Frank Moss and Others, Composing the Board of Police of the Police Department of the City of New York.—Motion denied, with ten dollars costs.

Edward A. Rollins v. Martha G. Cohen.—Motion granted, with ten dollars costs.

Edward A. Rollins v. Lewis S. Samuel et al.—Motion granted, with ten dollars costs.

In the Matter of the Application of the Board of Rapid Transit Railroad Commissioners for Appointment of Commissioners.—

Although the present commission did not sit as long as the commission appointed upon the last previous application, yet their labors seem to have been practically as great. In view of this fact and in view also of the curtailment of their ordinary summer vacation, we think it reasonable to grant the present commissioners the same amount as was awarded to their immediate predecessors, to wit, \$2,000 each.

Arthur L. Leshner and Others v. Leopold Haas and Others.—Motion granted, with ten dollars costs.

Daniel Rosenbaum v. Anna H. Silverman.—Motion granted, with ten dollars costs.

Jacob A. Zimmerman v. German Evangelical Lutheran Immanuel Church.—Motion denied, with ten dollars costs.

Beekman T. Burnham v. Emily A. Burnham.—Motion to dismiss appeal granted.

Beekman T. Burnham v. Emily A. Burnham.—Motion to dispense with printed papers denied.

The People of the State of New York ex rel. Thomas Allison v. Board of Education of New York.—Motion denied.

## SECOND DEPARTMENT, FEBRUARY TERM, 1898.

Martin, Bing & Co., Respondent, v. Louis Baust, Appellant; Irving De Revere, Anson Husted and Frank C. Husted, Respondents.—Judgment affirmed, with costs. No opinion. All concurred.

John H. Bryant, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulates to reduce the recovery of damages to the sum of \$7,000 and extra allowance proportionately, in which case the judgment as reduced is unanimously affirmed, without costs of this appeal to either party. No opinion.

Martino Cecio, Respondent, v. James Lyons, Appellant, Impleaded with Frank Lyons.—Judgment and order unanimously affirmed, with costs. No opinion.

In the Matter of the Application of the Port Chester Street Railway Company, for the Appointment of Commissioners to Determine Whether its Railroad ought to be Constructed in Certain Streets in the Town of Rye.—Application granted. Joseph A. Burr, Nathaniel H. Clement and George M. Olcott appointed commissioners. Order to be settled on five days' notice before the presiding justice.

## SECOND DEPARTMENT, MARCH TERM, 1898.

In the Matter of the Application of Samuel S. Watson for Admission to Practice as an Attorney and Counselor at Law.—Application granted.

In the Matter of the Application of Richard Edwards for Admission to Practice as an Attorney and Counselor at Law in the State of New York.—Application granted.

In the Matter of the Application of Gerald G. P. Jackson for Admission to Practice as an Attorney and Counselor at Law, etc.—Evi-

dence having been furnished that the applicant is a resident of the second judicial department, the application is granted.

Belle C. Schenck, Appellant, v. William D. Barnes and Henry W. Taft, as Trustee, Respondents.—Leave to appeal to the Court of Appeals granted. Proposed questions 1 and 2 certified; 3d question refused.

John Norris, Respondent, v. Frederick W. Wurster et al., Appellants.—Leave to appeal to the Court of Appeals granted. Third

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SECOND DEPARTMENT, MARCH TERM, 1898.

- proposed question certified; other questions refused.
- Becky Levy, Appellant, v. The Greenwich Insurance Company of the City of New York, Respondent.—Order modified by reducing the amount to be paid as condition of opening the default to the sum of twenty dollars, and striking therefrom the provision that the plaintiff submit to an examination. No opinion. All concurred. No costs of this appeal to either party.
- In the Matter of Paul E. Ames, as Receiver of Long Beach Association.—Order reversed and reference directed to Theodore B. Gates to take proof of the matters set forth in the petition and in the receiver's answer thereto, and to report proofs, with his opinion, to the court at Special Term. Ten dollars costs and disbursements to the party finally prevailing in this proceeding. No opinion. All concurred.
- Severin Christine Johnson, who is also known as Severine Christine Jorgenson, as Administrator, etc., of John Johnson, who was also known as Jorgen Jorgenson Osterholm, Deceased, Respondent, v. Andrew J. Post, Defendant, and William H. McCord, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Caroline Moser (now Abele), Respondent, v. Louise Moore Walker et al., Appellants.—Motion for reargument denied. Application for leave to appeal to the Court of Appeals denied as unnecessary.
- William N. Dykman, as Receiver of the Commercial Bank, Plaintiff, v. Seth L. Keeney et al., Defendants.—Application for allowance of costs on appeal granted.
- Victor Kitay, as Administrator, etc., Respondent, v. The Brooklyn, Queens County and Suburban Railroad Company, Appellant.—Application for leave to appeal to the Court of Appeals denied.
- Julia Ann Biot, as Executrix, etc., Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Application for leave to appeal to the Court of Appeals denied.
- In the Matter of the Application of Elbert A. Fanning to Continue Second Street, in the Village of Riverhead.—The undertaking does not bear the approval of the county judge, as required by section 83 of the Highway Law. There is no proof among the papers of the posting of the notice specifying the time and place of the meeting of the commissioners, and the other matters, as prescribed by section 83 of the same statute. The papers upon which the order of the County Court was granted have not been certified by such court to the Appellate Division, as directed by section 90 of the Highway Law. If these several omissions are supplied, the application may be renewed. The approval of the undertaking can be obtained *nunc pro tunc*; if the notices, under section 83, were actually posted, proof of that fact, if filed now, will be sufficient.
- Frederick Klinker, Respondent, v. The Third Avenue Railroad Company, Appellant.—Motion for reargument denied. Application for leave to appeal to the Court of Appeals denied.
- George Wright, Respondent, v. Nassau Electric Railroad Company, Appellant.—Cause settled after argument, by stipulation between the parties.
- The People of the State of New York ex rel. Thomas J. Linnekin, Appellant, v. John Ennis, as Commissioner, etc., Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred, except Goodrich, P. J., not sitting.
- Edward Koenig et al., Respondents, v. Henry Bloomgarten, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Mary Lynte, Respondent, v. William P. Fletcher, Appellant.—Order modified so that the condition shall be on the payment of ten dollars costs and of fees of witnesses and other taxable disbursements, made or incurred, which were rendered ineffectual by the adjournment, on the authority of *Kennedy v. Wood* (84 Hun, 14). All concurred.
- Eliza A. Murphy, as Administratrix, etc., of Frank Murphy, Deceased, Respondent, v. The Third Avenue Railroad Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.
- Mary A. Bethel, as Administratrix, etc., and Wilbur Sturges, as Administrator, etc., within this State, of Thomas W. Bethel, Deceased, Respondents, v. Aubrey G. Hutcheson and Willis A. Hutcheson, Appellants, Impleaded with Anna B. Hutcheson.—Order affirmed, with ten dollars costs and disbursements, to abide event of the action. No opinion. All concurred.
- Arthur A. McLean, Respondent, v. Dennis Ryan, Appellant.—Order reversed and motion granted upon the defendant, within thirty days, paying the plaintiff ten dollars costs and executing and delivering to him a bond with sufficient sureties to justify on notice, and to be approved by a justice of the Supreme Court, in the sum of \$5,000, conditioned for the payment of any judgment that plaintiff may recover in this action; the judgment and the proceedings thereunder, both in this State and in Minnesota, to stand as security until the final determination of the action. In default of the defendant's furnishing such bond, order appealed from affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Edwin B. Meeks, as Sole Surviving Executor, etc., Plaintiff, v. Joseph W. Meeks and Others, Defendants.—Motion to dismiss appeal denied, without costs.
- Nils Nilsson, Respondent, v. Hugh De Haven, Appellant.—Orders affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- William H. Meserole, Respondent, v. Lena R. Muller, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Gussie Reisfeldt, Appellant, v. Nassau Ferry Company, Respondent.—Judgment and order unanimously affirmed, with costs. No opinion.
- Frederick Fallows, Respondent, v. Rudolph Binder and Amelia Binder, Appellants.—Judgment and order unanimously affirmed, with costs. No opinion.
- In the Matter of the Application of the Brooklyn City Railroad Company for the Appointment of Commissioners to Determine the Necessity for the Construction of Tracks on Johnson Street.—This application is wholly informal. It should properly be made by petition, though we do not say that affidavits would not suffice if they contained all the necessary allegations entitling the applicant to the appointment of commissioners. The papers do not show that the Brooklyn City Railroad Company is a corporation, much less that it is a railroad corporation, incorporated under the laws of this State. If it is not such a corporation, it is not entitled to receive such a franchise. There are various other requirements by statute, with which the applicant must comply before it is entitled to maintain this application. The petition should be modeled somewhat after the form of that prescribed in condemnation proceedings. Application denied, with ten

- dollars costs and disbursements, with leave to renew.
- William Gardam and Joseph Gardam, Appellants, v. John Healy and John Doe (the name "John Doe" being fictitious, etc.), Defendants. Joel L. Isaacs, Respondent.— Order reversed, and motion granted striking out the notice of appearance and answer of the defendant Isaacs; and action ordered discontinued as to said defendant, without costs to either party. No opinion. All concurred.
- James J. E. Phillips, Respondent, v. Henry C. Fisher, Appellant.— Judgment and order affirmed, with costs. No opinion. All concurred, except Cullen, J., not sitting.
- Felix McCloskey, Appellant, v. The New York and New Jersey Bridge Company, Respondent.— Order reversed, with ten dollars costs and disbursements, and motion for preference granted on the authority of *Knox v. Dubroff* (17 App. Div. 290) on the ground that the right to a preference under rule 36 does not depend upon the value of the property attached. All concurred.
- Terrence F. Ferguson, Appellant, v. Julius F. Bruckman, Respondent, Impleaded with Others.— Judgment modified so as to direct that the receiver convert the assets of the partnership into money, pay expenses and costs, and then pay to the defendant \$1,688.19, and divide the remainder of the fund, if any, equally between the parties hereto; and if the fund shall be insufficient after applying the whole thereof to pay the whole of said sum of \$1,688.19, then that the defendant recover of the plaintiff one-half of such deficiency, and as modified the judgment is affirmed, without costs of this appeal to either party. No opinion. All concurred.
- William A. Banks, Plaintiff, v. The Brooklyn Heights Railroad Company, Defendant.— Objections overruled and judgment unanimously directed for defendant on the dismissal of the complaint at the Trial Term. No opinion.
- Sarah A. Weisz, Appellant, v. John J. White-lock, Respondent.— Interlocutory judgment affirmed, with costs to defendant to abide the event, and with leave to plaintiff to serve an amended complaint within twenty days. No opinion. All concurred.
- John F. B. Power, Respondent, v. Staten Island Electric Railroad Company, Appellant.— Interlocutory judgment affirmed, with costs, and with leave to the defendant, within twenty days, to withdraw demurrer and serve answer on payment of such costs. No opinion. All concurred.

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**ABANDONMENT** — *Of highways.*  
See HIGHWAY.

**ACCIDENT** — *Resulting from negligence.*  
See NEGLIGENCE.

**ACCOMMODATION PAPER:**  
See BILLS AND NOTES.

**ACCORD AND SATISFACTION** — *Of debts.*  
See DEBTOR AND CREDITOR.

**ACCOUNTING** — *Reference on.*  
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**ACTION** — *Issuing of attachments in.*  
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— *Relating to municipal corporations.*  
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— *Proceedings on the trial of.*  
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**ADJUDICATION:**  
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See PRINCIPAL AND AGENT.

**ALIMONY:**  
See HUSBAND AND WIFE.

**ALLEY** — *Easement of right of way in.*  
See EASEMENT.

**ALLOWANCE:**  
See COSTS.

**AMENDMENT** — *Of pleadings.*  
See PLEADING.

**ANSWER:**  
See PLEADING.

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**APPEAL** — *Dismissed for a failure to serve the printed appeal papers — a second appeal cannot be taken, without leave.*] 1. Where an appeal, taken by a defendant from an order granting a new trial in an action, is dismissed upon motion, because of a failure to make timely service of the printed appeal papers, the defendant cannot thereafter, without obtaining leave of the court, serve a second notice of appeal from the same order together with a proposed case on appeal, and insist upon a hearing of the case by the Appellate Division. SPERLING *v.* BOLL. . . . . 64

2. — *The dismissal does not affect the merits.*] The dismissal of the appeal takes the case and the parties out of court; such a dismissal does not, however, affect the merits, which may be the subject of subsequent inquiry should the case afterward come properly before the appellate court. *Id.*

3. — *Notice of appeal from an order not entered.*] A notice of appeal, dated April 3, 1897, stating that the defendant appeals "from the order and

**APPEAL** — *Continued.*

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judgment heretofore made and entered \* \* \* on the 8th day of March, 1897," is insufficient to effect an appeal from an order denying a motion for a new trial where the formal order was not entered until August, 1897, the clerk's minutes reciting that it was made upon the 5th day of March, 1897.

FRANCIS v. TILYU ..... 340

4. — *To authorize a review of a decision made under Code Civ. Proc. § 1022, an exception must be filed.*] Unless an exception is filed to a decision, made under section 1022 of the Code of Civil Procedure, the Appellate Division cannot, on an appeal from the judgment entered on such decision, review any question of fact. PRICE v. LEVY..... 620

— *Trial — improper comments of the court in the presence of the jury — cured by the charge — mode of reviewing such comments — record relative to the denial of a motion for an adjournment.*

See KLINKER v. THIRD AVENUE R. R. Co..... 322

— *Decision of a motion to direct a verdict — exception thereto, how taken, when the decision is reserved — power of review by the appellate court.*

See ELLIOTT v. VAN SCHAICK..... 587

— *Leave to appeal to the Court of Appeals — next of kin, for whom an executor may sue — effect of the death of the next of kin before the trial.*

See MUNDT v. GLOKNER..... 123

— *Alimony — when the objection that the defendant is unable to pay it will not be sustained on appeal.*

See KABATCHNICK v. KABATCHNICK ..... 292

— *Review of an order by a co-ordinate branch of the same court.*

See CORBIN v. CASINA LAND COMPANY ..... 408

**APPELLATE DIVISION** — *Rapid Transit Act — right of the court to impose conditions upon confirming the report of its commissioners — conditions of the bond required.*

See MATTER OF RAPID TRANSIT R. R. COMRS..... 608

**ARCHITECT** — *Negligence — liability of an owner who has employed a competent architect; where an architect alters the thickness of a foundation.*

See BURKE v. IRELAND ..... 487

**ARREST** — *Application for an order of arrest for fraud — the facts constituting the fraud must be stated.*

See HARRISBURG PIPE BENDING CO. v. WELSH..... 515

**ASSESSMENT** — *For the purposes of taxation.*

See TAX.

**ASSIGNMENT** — *General assignment — ratification by moving for a new assignee.*] 1. *Seemle*, that where judgment creditors of a debtor who has made an assignment for the benefit of her creditors, make a motion to remove the assignee and substitute another person in his stead, they thereby ratify the assignment, and are estopped from subsequently attacking it as fraudulent.

SWEETSER v. DAVIS. .... 398

2. — *An estoppel by judgment must be mutual.*] A judgment, based upon the existence of a partnership relation between a mother and her son, and a confession of judgment by them, in each of which it is stated that they are partners, are not effective by way of estoppel as to an assignee for creditors under a general assignment made by the mother — there being no privity between the parties in the judgment and the general assignee, or between them and the creditors represented by the general assignee. *Id.*

3. — *An assignment not set aside for frauds upon it.*] What are frauds upon a general assignment, as distinguished from frauds in it, and do not require it to be set aside, considered. *Id.*

— *Creditor's suit — assignment made by a corporation after a fraudulent transfer of its property — assignee enjoined from disposing of property — authority for bringing the suit.*

See KOECHIL v. LEIBINGER & OEHM BREWING CO..... 573

**ASSOCIATION** — *Expulsion of a member from a club — notice that a charge will be considered at a hearing before the board of directors — the proof may be made as broad as the notice — mandamus.*] A member of an association, incorporated under chapter 267 of the Laws of 1875 and subject to the provisions of the Membership Corporation Law (Chap. 559 of the Laws of 1895), issued a circular letter to the other members of the association, criticising the action of the board of directors in rejecting a person proposed for membership and suggesting that a special meeting of the members be called at which the by-laws might be so amended that the person rejected could be elected to membership and "similar club mistakes" be prevented, and stating that the person proposed had been rejected by two blackballs.

The board of directors, which had, under the by-laws of the association, power to annul a membership for conduct likely "to endanger the welfare, interests or character of the association," sent a letter to the member, stating that upon a certain day it would hold a meeting to consider the matter of the circular "in its prejudicial bearing upon the interests of the club," and requesting him to be present at the meeting "to give such explanations as you may desire to make in justification of your action."

At the meeting, the president of the board, after calling upon the member to state why he had issued the circular, refused, against the objection of the member that such proceeding was not in accordance with the letter of notification to him to appear, to permit him to discuss the rejection of the proposed member, but confined the trial to the consideration of the statement in the circular that only two blackballs had been cast against the person proposed for membership, which was charged to be a false statement, and subsequently the board expelled the member.

Upon an appeal from an order dismissing an alternative writ of mandamus issued to review this action of the board of directors, it was

*Held*, that the relator was entitled, under the letter of notification, to discuss the rejection of the proposed member as being one of his reasons for issuing the circular, and also to show as another of such reasons that the clerk of the club had, informed him that only two blackballs had been cast upon such rejection;

That, under the circumstances, the relator was entitled on the trial of the issues in the mandamus proceeding to have submitted to the jury the question whether he had been given reasonable notice to defend himself upon the charge upon which he was expelled, *i. e.*, of making a willful or reckless misstatement in the circular. **PEOPLE EX REL WARD v. UPTOWN ASSN.... 297**

— *Trusts — transfer of a fund, collected by subscription by an alumni association, to a seminary upon certain conditions — violation of the conditions by the seminary — incorporation of the association vesting the title to the fund in it — right of the corporation to retake the fund from the seminary.*

See **ASSOCIATE ALUMNI v. GENERAL SEMINARY..... 144**

— *Will — void gifts to benevolent societies — a son, the residuary devisee and legatee, prevented by the will from taking them — he takes them as heir at law.*

See **HENRIQUES v. STERLING. (Nos. 1 & 2)..... 30**

See **CORPORATION.**

**ATTACHMENT** — *Contract liability on the undertaking.*] 1. An undertaking, given upon the issuing of a warrant of attachment, creates a contract liability, and in an action brought upon such undertaking a counterclaim arising upon contract may be interposed by the sureties signing it.

See **BIEN v. FREUND..... 202**

2. — *Counterclaim against the defendant in the attachment suit enforced against an assignee of the undertaking.*] In an action brought upon the undertaking by an assignee thereof, the sureties are entitled, under section 502 of the Code of Civil Procedure, to interpose against such assignee, as a counterclaim, a demand against the defendant in the attachment suit, which they purchased before receiving notice of the assignment of the undertaking. *Id.*

3. — *When a claim must be purchased to be available as a set-off.*] A person who is liable upon a contract obligation, which has been assigned to a third party, may protect himself against such obligation in the hands of

**ATTACHMENT** — *Continued.*

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the assignee by the purchase of a cause of action against the original creditor at any time before notice of the assignment. *Id.*

4. — *Attachment of savings bank accounts.*] The levy of an attachment upon savings bank accounts standing in the name of the attachment debtor will not be disturbed upon the ground that the moneys represented by the accounts belonged to an estate, where it appears that the attachment debtor was not only executrix of the estate but also residuary legatee — certainly until the sheriff has had an opportunity to be heard in the matter.

KELLY v. BAKER. . . . . 217

**ATTORNEY AND CLIENT** — *New York city — bills of an attorney designated to act in a proceeding to take property for the board of education — the taxation thereof by a justice of the Supreme Court is a judicial act — mandamus.*

See PEOPLE EX REL. ALLISON v. BD. OF EDUCATION. . . . . 208

— *Fraudulent conveyances to secure bona fide indebtednesses — effect of the debtor and creditors being represented by the same attorneys.*

See SOMMERS v. COTTENTIN. . . . . 241

— *Power of the court to make an adequate allowance to an attorney defending proceedings de lunatico inquirendo.*

See MATTER OF HARDY. . . . . 164

**BAILMENT** — *Delivery to the husband of the bailor — liability therefor.*]

1. Where a wife deposits goods and takes therefor a receipt, which states that "the receipt must be returned on delivery of the goods;" and the bailee thereafter, without requiring the return of the receipt, delivers the goods to her husband, the wife is entitled to recover the value of the goods at the date of a demand therefor by her, and she is not limited in her recovery to the lowest estimate of the value of the articles as testified to by an expert called by her. MARKOE v. TIFFANY & Co. . . . . 95

2. — *Presumption.*] In such a case there exists a presumption that the goods belonged to the wife. *Id.*

3. — *What act constitutes conversion.*] It seems, that in such a case it is not error for the court to charge, in an action brought by the wife against the bailee to recover the value of the goods, that the act of the bailee in delivering the goods to the husband constituted a conversion. *Id.*

4. — *Delivery to the husband of presents given to the husband and wife.*] *Quære*, whether presents given to a husband and wife, left in the possession of the wife, and by her deposited for safe-keeping, may be properly delivered by the bailee to the husband. *Id.*

**BANKING** — *Payment of a draft — liability of a bank in collecting a draft for a customer — effect of the acceptance, by its agent, of the drawee's draft upon a third person.*]

1. Where the agent of a bank in which a draft has been deposited for collection surrenders the draft to the drawee and accepts a draft for its amount, drawn by the drawee upon a third person, the first-mentioned draft is thereby paid, the presumption being that the drawee's draft was accepted in payment of the draft received for collection; in any event, the collecting bank is bound either to return to its customer the draft received for collection, properly protested, so as to charge the drawer, or to pay him the money. KIRKHAM v. BANK OF AMERICA. . . . . 110

2. — *Liability for the act of a collecting agent.*] A bank which receives from a customer a draft for collection is liable for a loss occasioned by the acts of its correspondents or other agents selected by it to effect the collection. *Id.*

3. — *Effect of the collecting bank treating the note as paid.*] The effect of a collecting bank in such a case having notified its customer that a draft left with it for collection was paid, and having credited the customer in its account with him with the amount thereof, and for a long time thereafter having acted upon the theory that the customer was entitled to regard the draft as paid, considered. *Id.*

4. — *Bona fide transferee of negotiable paper.*] The receipt by brokers of a check drawn on a bank by a customer "as trustee," and deposited with the

**BANKING—Continued.**

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brokers in an account with this customer "as trustee," and proof that a subterfuge to withdraw the money from the category of trust funds was resorted to by a repayment of the money by a check drawn by the brokers to the trustee, who immediately deposited the proceeds of such check with the brokers, were considered to be sufficient evidence of notice on their part of the trust character of the money. *MARSHALL v. DE CORDOVA* ..... 615

— *Attachment of savings bank accounts.*

See *KELLY v. BAKER* ..... 217

**BENEVOLENT SOCIETY :**

See ASSOCIATION.

**BICYCLE** — *Negligence — death of a bicycle rider coming out from behind an approaching car at a street railroad crossing.*

See NEGLIGENCE.

**BILL OF PARTICULARS :**

See PLEADING.

**BILLS AND NOTES** — *A note valid in its inception — it may be sold at any price.*] 1. Where a note had a business inception at the time it was made it is immaterial, in an action against the payee, what a subsequent holder paid for it. *BLAIR v. HAGEMAYER* ..... 219

2. — *Burden of proof as to its diversion from the purpose for which it was given.*] Where, in an action upon a promissory note, the defense that it was diverted from the purpose for which it was given is interposed, the defendants must, in order to defeat a recovery, show that the plaintiff, presumptively a *bona fide* holder thereof for value and before maturity, had notice of the diversion, or adduce some clear evidence that he was guilty of bad faith in taking the note. *Id.*

3. — *Questions of diversion and of good faith to be submitted to the jury.*] Evidence considered upon which it was held to be erroneous for the trial court to take from the jury the questions as to the circumstances under which a promissory note was given, as to whether it had been diverted from the purpose for which it was given, and as to whether the plaintiff was a *bona fide* holder for value thereof. *Id.*

— *Payment of a draft — liability of a bank in collecting a draft for a customer — effect of the acceptance, by its agent, of the drawee's draft upon a third person.*

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**BONA FIDE PURCHASER** — *Of negotiable paper.*

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**BOND** — *Sheriff of New York — liability of his executrix and sureties for fees not paid over under chapter 523 of 1890 — constitutionality of that act — estoppel to deny its validity — form of a bond under this statute — the city may sue upon it.*

See *MAYOR v. GORMAN* ..... 191

— *Attachment — contract liability on the undertaking — counterclaim against the defendant in the attachment suit enforced against an assignee of the undertaking — it must exist before notice of an assignment of the undertaking.*

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— *Sale of.*

See SALE.

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**CODE OF CIVIL PROCEDURE** — § 83 — *Trial — improper comments of the court in the presence of the jury — mode of reviewing such comments.*

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— § 549 — *Pleading — application for an order of arrest for fraud — the facts constituting the fraud must be stated.*

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— § 603 — *Injunction, dependent upon the cause of action — the right thereto must appear in the complaint.*

See SANDERS v. ADER..... 176

— § 986 — *Place of trial — although a motion to change it for the convenience of witnesses, is denied on that ground, the change may be granted on the ground that both parties reside in the county to which the venue is changed, notwithstanding the fact that no demand has been made for such change, as a matter of right.*

See NAVRATIL v. BOHM..... 460

— § 994 — *Decision of a motion to direct a verdict — exception thereto, how taken, when the decision is reserved — power of review by the appellate court.*

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**CONSPIRACY** — *Subornation of perjury — proof of acts and declarations of conspirators, out of each other's presence, is admissible — proof of attempts to induce others to swear falsely — cross-examination as to collateral matters.*

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**CONSTITUTIONAL LAW** — *The act limiting the sale of passage tickets to common carriers and their authorized agents is constitutional.] Chapter 506 of the Laws of 1897 (constituting §§ 615, 616 of the Penal Code), confining the sale of passage tickets exclusively to common carriers or their authorized agents, and providing for the redemption by the carriers of tickets not used, is designed to protect passengers from fraud in the sale of such tickets, and is a proper exercise of the police power of the State over the general subject of transportation. It does not deprive a person who, in consequence of it, is prevented from continuing the business of speculating in passage tickets, of life, liberty or property without due process of law, nor deny to him the equal protection of the law within the meaning of the Constitution of the United States; nor does it impair the obligation of a contract or constitute an invasion of the exclusive power of Congress to regulate interstate commerce. PEOPLE EX REL. TYROLER v. WARDEN..*

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— *Crimes — a crime charged as a second offense — proof, on the trial, of the former offense although the prisoner admits it — it is not violative of the Constitution.*

*See* PEOPLE v. SICKLES ..... 470**CONSTRUCTION** — *Of constitutional provisions.**See* CONSTITUTIONAL LAW.— *Of contracts.**See* CONTRACT.— *Of deeds.**See* DEED.— *Of statutes.**See* REVISED STATUTES.*See* SESSION LAWS.*See* STATUTE.*See* UNITED STATES REVISED STATUTES.— *Of wills.**See* WILL.

**CONTRACT** — *Construction of a compromise agreement of sale as to goods delivered to a factor.] 1. In an action brought to enforce a factor's lien which the plaintiffs claimed to have upon goods sent to them by the defendant, it appeared that a dispute having arisen as to whether the goods had been sold to the plaintiffs outright or had been consigned to them as factors, the parties in compromise of the dispute entered into a written agreement stating, "all stock you (the plaintiffs) now have and consider consigned to be settled for by note, and we (the defendant) guarantee the price of \$50.00 per ton. Further, we (the defendant) agree to renew a portion not more than \$1,500.00 of the \$2,500.00 note already given us on account, and the June sales \* \* \* to be settled for on a cash basis; and we agree to accept customers' notes for portion and cheque for balance in full to July 1st, 1893."*

*Held*, that the complaint was properly dismissed;

That the instrument operated as a transfer to the plaintiffs of the title to the goods in question, and that whatever recourse they might have against the defendant would be upon the guaranty after they had sold the goods.

SPAULDING v. AMERICAN WOOD BOARD CO. .... 237

2. — *Contract to dig wells, the payment for the work to be dependent on the amount of water furnished — the proper construction of a provision for a test*

**CONTRACT** — *Continued.*

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*determined by the action of the parties.]* A contract, drawn by a layman, was as follows: "We agree to put in for you two wells to furnish station No. 8 at No. 81 Guinett Street, Brooklyn, E. D., at the uniform price of \$10.00 per 1,000 gallons of water furnished per day of 24 hours. \* \* \* It is understood that after test and upon completion of the wells the price agreed upon is due and payable." Under this contract a test of less than twenty-four hours continuance took place, of which the corporation for which the work was to be done was notified, and at which its representative was present, and neither at that time nor for a long time thereafter did the corporation express any dissatisfaction with the manner in which the test was made.

*Held*, that, under the circumstances, it was not necessary that the test should have continued for twenty-four hours.

BENNETT v. EDISON ELECTRIC ILL. CO. . . . . 363

3. — *Rule of construction of evidence where a party is in possession of the subject-matter of a negative averment.]* Where a corporation in possession of wells presents, upon the trial of an issue as to their capacity, very meagre evidence as to their production, the principle may be invoked against it that where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is to be taken as true unless disproved by that party. *Id.*

4. — *Government contract—agreement to do work upon the articles to be supplied is not an assignment of the contract.]* A contract by which one party agrees to do certain work upon articles which the other party thereto has contracted to supply to the United States government does not constitute an assignment of an interest in the government contract within the meaning of section 8737 of the United States Revised Statutes, forbidding such an assignment. WHITE v. McNULTY. . . . . 173

5. — *Objection that the government contractor was not a manufacturer or regular dealer in the articles to be supplied.]* The objection that the government contract was illegal under section 3722 of the United States Revised Statutes, because the contractor was not a manufacturer of or regular dealer in the articles which he contracted to supply, can be taken advantage of only by the government. *Id.*

6. — *Contract to plaster a "seven-story building, \* \* \* according to plans furnished," construed.]* A contract to plaster "your seven-story building, \* \* \* according to plans furnished us by your architect," is to be construed as a contract not to plaster all of the "seven-story building," but to plaster it "according to plans furnished;" and the contract not being formal and no specifications having been furnished, it is competent upon the trial of an issue as to whether the contract embraced the plastering of the basement and bulkhead of the building, to show what was said between the parties in regard to the portions of the building to be plastered.

ADAMANT MANUFACTURING CO. v. BACH. . . . . 255

7. — *Evidence of a custom.]* In such a case it is not improper to exclude evidence of the custom of the building trade as to what is included in the expression a "seven-story building." *Id.*

8. — *Breach of contract—failure to pay as agreed—excuse must be shown therefor.]* Where a dealer in flowers has not, during a period of five weeks, paid, in accordance with the terms of his contract, for flowers delivered to him, in any one of such weeks, but has in each case been several days behind-hand in his payments, and when payment has been demanded has refused to make it, it is improper, in an action brought against such dealer by the vendor of the flowers, to recover damages as for a breach of the contract by the dealer, in the absence of some good excuse furnished by him for such defaults on his part, to dismiss the complaint.

*It seems*, that, if excuse be given, a question of fact is presented.

DEVROY v. NEW YORK CUT FLOWER CO. . . . . 539

9. — *Agreement by a wife to pay her husband one-half of the profits on a purchase and sale of real estate—proof required and consideration necessary to sustain it.]* 1. An oral agreement made by a wife with her husband to the effect that she will purchase certain real estate, and whenever it is sold will pay him one-half the proceeds, after deducting the purchase

**CONTRACT** — *Continued.*

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price, cannot be enforced unless its terms and conditions are clearly proven and it is shown to have been based upon a good and valuable consideration — a meritorious consideration is not sufficient.

Where, in an action brought upon the alleged agreement by the husband after a resale of real estate purchased by the wife, it appears that the property was bid in by him in the name of the wife and was paid for with money borrowed by her and by a purchase-money mortgage, and there is no evidence of any definite arrangement before or at the sale (the agreement, if any was made, having been made after the sale), or of any consideration to support the alleged agreement as to the disposition of the proceeds, the complaint is properly dismissed. *GOUGE v. GOUGE*. . . . . 154

— *New York city — purchase of supplies — when a supply is "needful for any particular purpose," and the contract exceeds \$1,000, it must be awarded upon bids submitted after public notice — several orders each less than but together exceeding \$1,000 are within the statute.*

See *WALTON v. THE MAYOR*. . . . . 76

— *Corporation — guaranty of a lease executed by a brewing company in consideration of the lessee's promise to buy beer from the company — the plea of ultra vires cannot be asserted — sealed instrument expressing a consideration.*

See *KOEHLER & CO. v. REINHEIMER*. . . . . 1

— *A written sealed lease — a prior parol promise by the landlord to make repairs is merged in it — a promise during the term to repair if the tenant would remain is without consideration.*

See *HALL v. BESTON*. . . . . 105

— *Oral agreement by a vendee, in consideration of a deed of land, to discharge mortgages on other land of the vendor — Statute of Frauds — Statute of Limitations.*

See *PURDY v. COLLYER*. . . . . 388

— *Specific performance of an oral agreement by which a daughter promised to convey lands, for which the father had paid, as he might direct.*

See *JEREMIAH v. PITCHER*. . . . . 402

— *Promise of a landlord to repair a ceiling — personal injury to the tenant from its breach — liability of the landlord — remedy of the tenant.*

See *SCHICK v. FLEISCHHAUER*. . . . . 210

— *Expert employed to investigate in reference to the fall of a building — he may charge fees for attending a coroner's investigation.*

See *BROWN v. TRAVELERS' LIFE & ACC. INS. CO.*. . . . . 544

— *Action to recover for the loss of profits which would have accrued but for defendant's default — proof required to sustain it.*

See *ENRIGHT v. AMERICAN BELGIAN LAMP CO.*. . . . . 381

— *The consideration necessary to sustain an agreement to extend the time of payment of an obligation, considered.*

See *TOPLITZ v. BAUER*. . . . . 125

— *Sufficiency of a complaint for its enforcement.*

See *KELLY v. BAKER*. . . . . 217

— *Relating to negotiable paper.*

See *BILLS AND NOTES*.

— *Law of, relating to deeds.*

See *DEED*.

— *Between husband and wife.*

See *HUSBAND AND WIFE*.

— *Of insurance.*

See *INSURANCE*.

— *Law of, relating to mortgages.*

See *MORTGAGE*.

**CONTRIBUTORY NEGLIGENCE:**

See *NEGLIGENCE*.

**CONVERSION** — *Of personal property.*  
See PERSONAL PROPERTY.

**CONVEYANCE** :  
See DEED.

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**CORPORATION** — *Validity of an issue of nearly all the stock to a construction company.*] 1. Where a water company, having no creditors and only three stockholders, each holding one share of stock, enters, with the consent of two of the stockholders, and without objection on the part of the third, into a contract for the construction of its plant, whereby it agrees to pay the constructing firm, among other things, the balance of its entire issue of stock, and the contract is fully performed on both sides, a person who subsequently buys stock which was issued to his assignor in payment for services rendered to the constructing firm, cannot be heard to assert that the contract was invalid upon the ground that it was executed in fraud of the rights of the stockholders; this is certainly the case where he does not offer to restore to the constructing firm the value paid by it for the stock.

Drake v. New York Suburban Water Co. . . . . 499

2. — *Binding force of a former adjudication that a consolidation of companies was valid.*] A judgment in an action adjudging that the proceedings to effect a consolidation of two corporations were valid, is, although not pleaded, conclusive evidence of that fact, where it becomes an issue in an action brought against the corporations by a stockholder acquiring his stock through, and who is in privity with, one of the plaintiffs in the first-mentioned action in which such judgment was entered. *Id.*

3. — *Estoppel created by the acquiescence of a stockholder in the acts of the corporation.*] It is the duty of a stockholder, if he desires to set aside acts of the corporation, to act promptly, and in failing to do so he becomes bound by his acquiescence therein, and is estopped from asserting any right as against a person who has in good faith dealt with the corporation and received its securities.

A delay of several years held to be fatal. *Id.*

4. — *The rights of corporate creditors must be first protected in adjudication as to those of the stockholders.*] The rights of a stockholder are subordinate to those of creditors of a corporation, and the courts will not approve any judgment which directs a sale of all the property of certain corporations in the interest of a stockholder, or of one particular class of stockholders, and which makes no provision for the payment of creditors. *Id.*

5. — *Power to make by-laws limiting the right to vote upon or to transfer its stock until dues are paid.*] The right of a stockholder in a corporation to vote upon and to transfer his stock can be limited, if at all, only by an express statutory provision, or by a provision in the articles of association; a by-law by which a stockholder is prevented from voting upon or transferring his stock until all dues thereon have been paid is invalid, even as against a stockholder who agreed to take his stock subject to "the by-laws \* \* \* as to dues and transfers." *KINNAN v. SULLIVAN COUNTY CLUB.* . . . 218

6. — *Construction of section 11 of the General Corporation Law.*] Section 11 of the General Corporation Law (Laws of 1890, chap. 563), empowering a corporation to make by-laws regulating the transfer of its stock, only authorizes the corporation to prescribe the officer by whom the stock shall be transferred and the mode of its transfer; it does not authorize an imposition upon the stock of a penalty limiting the unconditional right of transferring it. *Id.*

7. — *Guaranty of a lease, executed by a brewing company in consideration of the lessee's promise to buy beer from the company.*] A guaranty of the performance by the lessee of premises to be used as a saloon, of the conditions and covenants contained in the lease, executed by a corporation organized under the General Manufacturing Act (Laws of 1848, chap. 40), for the manufacture of ales and beer, in consideration of the lessee's promise to buy his beer of the corporation, is not *ultra vires*.

KOEHLER & Co. v. REINHEIMER. . . . . 1

**CORPORATION** — *Continued.*

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8. — *The plea of ultra vires cannot be asserted.*] When, moreover, it appears that the lessor delivered possession of the premises to the lessee, in reliance upon such guaranty, the corporation will not be permitted to advance the plea of *ultra vires*. *Id.*

9. — *Sealed instrument expressing a consideration.*] The fact that such a contract is under seal and expresses a consideration is sufficient to support it. *Id.*

— *Trusts* — transfer of a fund, collected by subscription by an alumni association, to a seminary upon certain conditions — violation of the condition by the seminary — incorporation of the association vesting the title to the fund in it — right of the corporation to retake the fund from the seminary.

See ASSOCIATE ALUMNI v. GENERAL SEMINARY..... 144

— *Taxation of a corporation* — a deduction of ten per cent of its capital stock depends on its surplus equalling that sum — failure to prove the source of a surplus — an objection not taken before the assessors is not available at Special Term.

See PEOPLE EX REL. CITIZENS' ILLUM. CO. v. NEFF..... 542

— *Action against a director for a failure to file an annual report* — leave to serve an amended answer — merits of the proposed answer not considered — laches in making the application.

See GERDAU v. FABER..... 606

— *Creditor's suit* — assignment made by a corporation after a fraudulent transfer of its property — assignee enjoined from disposing of property — authority for bringing the suit.

See KOEHL v. LEIBINGER & OEHM BREWING CO..... 573

— *Will* — void gifts to benevolent societies — a son, the residuary devisee and legatee, prevented by the will from taking them — he takes them as heir at law.

See HENRIQUES v. STERLING. (Nos. 1 & 2)..... 30

— *Taxation* — when the machinery of a corporation is taxable as "land."

See PEOPLE EX REL. NAT. STARCH CO. v. WALDRON..... 527

— *Societies, clubs and similar bodies.*

See ASSOCIATION.

**COSTS** — *Power of the court to make an adequate allowance to an attorney defending proceedings de lunatico inquirendo.*] Section 2336 of the Code of Civil Procedure, while making general provision for the costs to be awarded an attorney defending a proceeding taken to have a person declared incompetent, does not regulate the compensation for services rendered as between attorney and client.

It is important that an alleged lunatic should be afforded every reasonable opportunity to defend himself in proceedings instituted to have him adjudged to be insane; and if he be ultimately found to be insane the court has the power to award such sum as seems reasonable and right under the circumstances, payable out of his property, to the attorney who has rendered services in defending him. MATTER OF HARDY..... 164

— *Mortgage foreclosure* — the costs are a necessary incident to the mortgage lien — they are enforceable out of surplus moneys in the same manner as the debt itself.

See BUSHWICK SAVINGS BANK v. TRAUM..... 532

**COUNSEL FEE:**

See COSTS.

**COUNTERCLAIM:**

See SET-OFF.

**COURT** — *Moneys paid into court by New York city in condemnation proceedings* — they are subject to the control of the court, and it may change the custodian to the end that the life tenant may receive a higher rate of interest — notice of the proposed change must be given to the remaindermen.

See MATTER OF NEWTON..... 547

**COURT—Continued.**

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- *Rapid Transit Act—right of the court to impose conditions upon confirming the report of its commissioners—conditions of the bond required.*  
*See* MATTER OF RAPID TRANSIT R. R. COMRS..... 608
- *Notice of the appointment of a new trustee of a mortgage.*  
*See* GRIFFIN v. BAUST..... 558

**CREDITOR:**

*See* DEBTOR AND CREDITOR.

**CREDITOR'S SUIT:**

*See* EQUITY.

**CRIME—Subornation of perjury—proof of acts and declarations of conspirators, out of each other's presence, is admissible.]** 1. In order that evidence of the acts and declarations of one of two persons (both of whom have been indicted for the crime of subornation of perjury) in the absence of the other, should be competent against the latter, it must appear that the two persons acted from a common purpose and design to do the act constituting the offense. *PEOPLE v. VAN TASSEL*..... 445

2. — *Proof of attempts to induce others to swear falsely.]* Proof of attempts, upon the part of the accused, to induce other persons to testify falsely upon the trial of the same action, is admissible upon the questions of motive and intent. *Id.*

3. — *Cross-examination as to collateral matters.]* A witness cannot be cross-examined upon collateral matters merely for the purpose of forming a basis for the impeachment of his statements by other witnesses. *Id.*

4. — *Section 688 of the Penal Code is constitutional.]* Section 688 of the Penal Code, relative to the effect of a former conviction upon the punishment to be inflicted in the case of a conviction for a second offense, is constitutional. *PEOPLE v. SICKLES*..... 470

5. — *A crime charged as a second offense—proof, on the trial, of the former offense although the prisoner admits it—it is not violative of the Constitution.]* Where, upon the trial of an indictment for the crime of robbery, charged as a second offense, the accused pleads not guilty, and before the jury is impanelled admits a former conviction, proof of such prior conviction is admissible, on the trial, upon the part of the prosecution, as it constitutes an integral part of the crime charged. It must, when put in issue by a plea of not guilty, be passed on by the jury. *Id.*

— *Liquor Tax Law—an offender against its provisions cannot be sentenced to an imprisonment of one day for each dollar of the fine unpaid—discharge under a writ of habeas corpus.*

*See* *PEOPLE v. STOCK*..... 564

**DAMAGES—Action to recover for the loss of profits which would have accrued but for defendant's default—proof insufficient to sustain it.]** 1. A complaint in an action demanded damages for a loss of profits which would have resulted from the manufacture and sale of goods, in which it was necessary to make use of certain patented articles which the plaintiff had loaned to the defendant, and the defendant, on demand, had refused to return. It appeared that the plaintiff had had at all times a large amount of the goods on hand, and he gave no proof that if he had had others he could have sold them.

*Held*, that, under the circumstances, the plaintiff was not entitled to recover for the loss of resultant profits. *ENRIGHT v. AMERICAN BELGIAN LAMP CO.* 381

2. — *Bailment—delivery to the husband of the bailor—liability therefor—measure of damages.]* Where a wife deposits goods and takes therefor a receipt which states that "the receipt must be returned on delivery of the goods," and the bailee thereafter, without requiring the return of the receipt, delivers the goods to her husband, the wife is entitled to recover the value of the goods at the date of a demand therefor by her, and she is not limited in her recovery to the lowest estimate of the value of the articles as testified to by an expert called by her. *MARKOE v. TIFFANY & CO.*..... 95



**DAMAGES** — Continued.

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— *Negligence* — next of kin, for whom an executor may sue — effect on the amount of damages of the death before the trial of the action of one originally entitled to the recovery.

See *MUNDT v. GLOKNER*..... 128

— *Surplus moneys* — damages for a breach of contract secured by a subsequent mortgage — right of the referee to determine such damages — measure of damages.

See *GUTWILLIG v. WIEDERMAN*..... 26

— *Libel* — new libelous matter, not connected with the libel sued for nor inquired into, cannot be pleaded in mitigation of damages.

See *HESS v. NEW YORK PRESS CO*..... 73

— *Abutter's action against an elevated railroad* — evidence of independent sales and rentals is inadmissible — when the objection is not waived.

See *LYONS v. N. Y. ELEVATED R. R. CO*..... 57

— *Libel* — evidence in mitigation cannot reduce compensatory damages.

See *YOUNG v. FOX*..... 261

**DANGEROUS MACHINERY :**

See *MASTER AND SERVANT*.

**DE LUNATICO INQUIRENDO** — Power of the court to make an adequate allowance to an attorney defending proceedings de lunatico inquirendo.

See *COSTS*.

**DEBTOR AND CREDITOR** — Accord and satisfaction — the use by a creditor of a check of his debtor after protesting that it was too small in amount.] 1.

The delivery by a debtor, and the acceptance and use by the creditor, of a check for a balance of account as it appears by a statement made by the debtor, in reference to which, when objected to by the creditor, the debtor says: "That is what you are going to get; you can take it or leave it; if you want any more you can sue me," the creditor replying: "I will sue you. I accept this thing as a part payment of what you owe me," and, when asked to give the debtor a receipt in full, declining to do so, does not constitute an accord and satisfaction. *ROTHSCHILD v. MOSBACHER*..... 167

2. — *Corporation* — the rights of corporate creditors must be first protected in adjudicating as to those of the stockholders.] The rights of a stockholder are subordinate to those of creditors of a corporation, and the courts will not approve any judgment which directs a sale of all the property of certain corporations in the interest of a stockholder, or of one particular class of stockholders, and which makes no provision for the payment of creditors.

*DRAKE v. NEW YORK SUBURBAN WATER CO*..... 499

— *Fraudulent conveyances to secure bona fide indebtednesses* — to make them void, the creditors must have participated in the fraud — effect of a provision that the surplus is to be returned to the debtor; of the debtor's remaining in possession, and of the debtor and creditors being represented by the same attorneys — presumption from there being no change of possession.

See *SOMMERS v. COTTENTIN*..... 241

— *Creditor's suit* — assignment made by a corporation after a fraudulent transfer of its property — assignee enjoined from disposing of property — authority for bringing the suit.

See *KOEHL v. LEIBINGER & OEHM BREWING CO*..... 573

— *General assignment* — ratification by moving for a new assignee — an estoppel by judgment must be mutual — an assignment not set aside for frauds upon it.

See *SWEETSER v. DAVIS*..... 398

— *Conveyance by a husband to his wife in consideration of a loan of moneys which had been paid by the husband to the wife for services.*

See *BIRDSALL, WAITE & PERRY CO. v. SCHWARZ*..... 343

— *Questions arising under attachments.*

See *ATTACHMENT*.

**DECLARATION** — *When competent as evidence.*

*See* EVIDENCE.

**DECREE :**

*See* JUDGMENT.

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**DEED** — *Construction of a grant of an easement in an alley.*] A grant made by the common owner of two adjoining lots, each about one hundred feet deep, and each having a house thereon about twenty-two feet in depth, of the use of an alley, lying between such lots, expressed in the words "Together with the right, at all times, to the use of an alleyway ten feet wide, along the south side of said premises above described, in common with the owner or owners of the premises adjoining on the south, at all times, for ingress and egress to and from said lands above described," conveys to the grantee an easement in an alley ten feet wide running along the entire length of the south side of his lot, and such easement is not limited to a distance of only such length in excess of twenty-two feet as would enable the grantee of the first conveyed parcel to turn from the alley into his lot behind the house which stood on such lot at the time of the conveyance.

*WEED v. DONAHUE*..... 360

— *A direction to a trustee to convey is not a present gift.*

*See* PAGET *v.* MELCHER..... 12

**DEFINITION** — *Of "waste" and "injury" as used in the Taxpayers' Acts.*

*See* SHEEHY *v.* McMILLAN..... 140

**DEMAND** — *Replevin — demand necessary in case of a chattel sold conditionally.*

*See* MORAN *v.* ABBOTT..... 570

— *Not necessary in the case of a misappropriation of trust money.*

*See* MARSHALL *v.* DE CORDOVA ..... 615

**DEMURBER :**

*See* PLEADING.

**DENIAL :**

*See* PLEADING.

**DEPOSIT** — *Of chattels.*

*See* BAILMENT.

**DESCENT** — *Will — void gifts to benevolent societies — a son, the residuary devisee and legatee, prevented by the will from taking them — he takes them as heir at law.*

*See* HENRIQUES *v.* STERLING. (Nos. 1 & 2)..... 30

**DISCHARGE** — *Of debts.*

*See* PAYMENT.

**DISMISSAL** — *Of an appeal — it does not affect the merits.*

*See* APPEAL.

**DOCTOR :**

*See* PHYSICIAN.

**EASEMENT** — *Deed — construction of a grant of an easement in an alley.*

*See* WEED *v.* DONAHUE ..... 360

**EJECTMENT** — *Action of ejectment — not changed into an equitable one by a demand for unnecessary equitable relief.*] The complaint in an action alleged that a certain deed executed to, and a will made in favor of, one of the defendants were void because the grantor and testatrix was of unsound mind at the time of their execution, and was induced to execute them by the fraud of such defendant, and demanded that the plaintiff, as heir at law of the grantor and testatrix, recover an undivided one-seventeenth part of the premises, with damages for the withholding thereof.

*Held*, that the action was one at law and was maintainable ;

That the fact that the plaintiff, in addition to the above relief, asked that the conveyance and will be declared invalid and of no effect, and that the

**EJECTMENT** — *Continued.*

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same be set aside and canceled of record, and that the said defendant be barred from setting up or asserting her pretended title to the land, did not change the character of the action or indicate an intention on the part of the plaintiff to sue in equity, and thus waive her constitutional right to a trial of the issues in the action before a jury in a common-law action.

BENNETT v. VONDER BOSCH..... 311

**ELECTION** — *Corporation — power to make by-laws limiting the right to vote upon its stock until dues are paid.*

See KINNAN v. SULLIVAN COUNTY CLUB..... 213

**ELEVATOR** — *Injury on.*

See NEGLIGENCE.

**EMINENT DOMAIN** — *Moneys paid into court by New York city in condemnation proceedings — they are subject to the control of the court, and it may change the custodian to the end that the life tenant may receive a higher rate of interest — notice of the proposed change must be given to the remaindermen.]* 1. Moneys deposited by the city of New York, pursuant to the act relative to a new aqueduct (Laws of 1883, chap. 490, § 17), in a trust company designated by the court, accompanied by instructions that the interest be paid to a described person for life, and that after her death the principal be distributed, under the order of the court, to the persons legally entitled to receive it, are thereafter in the custody of the court, and it, in the interest of the life tenant, may direct them to be transferred to a county treasurer who will secure for their use a higher rate of interest than the trust company allows, but this will not be done unless the remaindermen are given notice of the application. MATTER OF NEWTON..... 547

2. — *Abutter's action against an elevated railroad — evidence of independent sales and rentals is inadmissible — when the objection is not waived.]* In an action brought by an abutting owner against an elevated railroad in the city of New York to obtain an injunction and to recover damages, evidence, duly objected to, of the sales and rentals of property in the same street, other than that affected by the action, is inadmissible, and neither the fact that the evidence was offered, as stated by the defendant's counsel, in order to show that the plaintiff's expert was not competent to speak of values upon the street in question, or that his opinion was erroneous, nor the fact that the plaintiff himself subsequently offered similar evidence which was admitted on the same ground, prevents the plaintiff's taking advantage of his objection. LYONS v. N. Y. ELEVATED R. R. Co..... 57

3. — *The taking of land used for business purposes — the general character of the business, but not its profits, may be proved.]* Where a plot of land, having a store thereon, in which the owners have carried on business as merchants, is taken in condemnation proceedings, the owners, in a proceeding to determine its value, are entitled to show the general character of the business, but not the profits which they had realized from it; such profits depend largely upon judgment, forethought, business skill, the use of capital and the condition of trade, all of which are elements foreign to the value or location of the land itself. MATTER OF GILROY..... 314

4. — *The owner may prove the value of the land as used for any purpose.]* It seems, that, in such a proceeding, the owner is entitled to show the value of the land for any purpose for which it may be used, even though he may have put it to a different use. *Id.*

5. — *Condemnation commissioners may form an opinion of value from a personal inspection.]* Commissioners appointed in condemnation proceedings may properly be influenced in their appraisal by the conclusions which they have reached from their personal inspection and examination of the premises to be taken. MATTER OF DALY..... 326

6. — *Variance from the values sworn to.]* An award of \$2,669.29, which was \$367.36 less than the highest valuation and \$72 less than the lowest valuation given by witnesses called by the municipality seeking to acquire the land, it was considered, on an appeal therefrom by the owner of the land taken, should not be set aside. *Id.*

**EMINENT DOMAIN** — Continued.

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— *Assessment for taxation — an award, made in condemnation proceedings, under chapter 490 of 1888, refused by owners as inadequate and deposited in a trust company to their credit.*

See **PEOPLE EX REL. LYON v. HALSTED**. . . . . 816

**EMPLOYER AND EMPLOYEE:**

See **MASTER AND SERVANT**.

**EQUITY** — *Action in equity to set aside transfers of a life insurance policy — on a failure to establish an equitable cause of action, a money judgment at law is improper.*] 1. Where the complaint in an action alleges simply a single equitable cause of action to set aside transfers, alleged to have been obtained by fraud and duress, of a policy of life insurance, made by the plaintiffs, the beneficiaries thereunder, to one of the defendants, and subsequent transfers made by such defendant and by others, resulting in its final transfer by the last assignee (since deceased) to the insurer and a subsequent cancellation of the policy by such insurer, the court must, upon the failure of the plaintiffs to prove their cause of action and to show that the transfers in question were void, dismiss the complaint.

In such a case, in the absence of suitable allegations, the court has no authority to grant, against the executors of the deceased assignee, a money judgment based upon the theory that he, by his acts, converted the policy.

**TOPLITZ v. BAUER**. . . . . 125

2. — *A defendant cannot by answer interject into the equitable action a new legal cause of action for conversion available only against co-defendants and enable the plaintiffs to recover judgment thereon.*] A defendant cannot in such a case, by her answer, set up and interject into the equitable action a purely legal cause of action for a conversion of the policy of insurance, which, if it existed at all, was vested in the defendant at the time the action was brought, such cause of action being alleged to have arisen in her favor out of her dealings with the assignee, since deceased, who transferred the policy to the insurance company, and whose executors are made parties defendant to the action, and which is available only against them; and by such allegations create a transfer of such cause of action to the plaintiffs, thus entitling them to recover upon an entirely different cause of action from that alleged in the complaint. *Id.*

3. — *Remedy at law in an action seeking equitable relief.*] *Semble*, that where a complaint alleges facts which would constitute a cause of action, either at law or in equity, and it appears upon a trial, before a court of equity, that the plaintiff is not entitled to equitable relief, the court may in certain cases retain the action and order it to be tried as an action at law. *Id.*

4. — *Creditor's suit — assignment made by a corporation after a fraudulent transfer of its property.*] A judgment creditor of a corporation, whose execution issued upon his judgment has been returned unsatisfied, may maintain an action in equity to set aside an assignment for creditors, made by the corporation after it had, with knowledge of its insolvency, already fraudulently disposed of a considerable part of its property among its officers and attorneys, and to secure payment of his judgment from the property of the corporation by virtue of the lien created by the issuing of the execution and the institution of the action.

**KOECHL v. LEIBINGER & OEHM BREWING CO.** . . . . . 578

5. — *Assignee enjoined from disposing of property.*] In such a case the court considered that an injunction should be granted to prevent the assignee of the corporation from disposing of the proceeds of a sale of the corporate property, to the extent of the plaintiff's judgment, until the decision of the creditor's suit. *Id.*

6. — *Authority for bringing the suit.*] The right to maintain such a suit rests wholly upon the established rules of courts of equity, and not upon the provisions of article 1 of title 4 of chapter 15 of the Code of Civil Procedure. *Id.*

7. — *Creditor's action to set aside a conveyance from a husband to his wife — presumption of fraud — failure of proof that the husband was insolvent and was indebted to the plaintiff when the conveyance was made.*] *Semble*, that a

**EQUITY**—*Continued.*

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conveyance made by a husband to his wife is presumptively fraudulent as to the husband's creditors, but an action brought by a creditor of the husband to set it aside must fail where it is not shown that he was a creditor when the transfer was made or that the husband was then insolvent.

ALLEE v. SLANE ..... 455

— Oral agreement by a vendee, in consideration of a deed of land, to discharge mortgages on other land of the vendor—when an action is for specific performance and not to remove a cloud on title.

See PURDY v. COLLYER ..... 338

— Action by "The Commercial Advertiser" to restrain the use of the name "New York Commercial" by another newspaper.

See COMMERCIAL ADV. ASSN. v. HAYNES ..... 279

— Action of ejectment—not changed into an equitable one by a demand for unnecessary equitable relief.

See BENNETT v. VONDER BOSCH ..... 311

— Misappropriation of trust money—an action for its recovery is an equitable action.

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— Use of a business name—injunction to prevent another person from assuming it.

See CHURCH v. KRESNER ..... 349

**ESTOPPEL**—Corporation—binding force of a former adjudication that a consolidation of companies was valid—estoppel created by the acquiescence of a stockholder in the acts of the corporation.

See DRAKE v. NEW YORK SUBURBAN WATER CO. .... 499

— Estoppel of a former judgment—that the same issue was involved must be proved by the person who alleges it—the charge of the judge to the jury is competent evidence on that question.

See ROWLAND v. HOBBY ..... 523

— Estoppel by judgment—how far a matter must have been passed upon to preclude its consideration in a second suit.

See MCCARTHY v. HILLER ..... 588

— An estoppel by judgment must be mutual.

See SWEETSER v. DAVIS ..... 398

**EVIDENCE**—*Expert testimony.*] 1. Upon the trial of an action, based upon the negligent act of the owner of a building which fell and killed a tenant therein, to recover damages resulting from his death, an expert witness should be permitted to answer the question, "Now state what in your opinion was the cause of the falling of that building," and the further question, "Well, how in your opinion, did the force of the storm affect the building so as to cause it to fall; in what way."

QUIGLEY v. JOHNS MANUFACTURING CO ..... 434

2. — *Insufficient proof of partnership.*] What proof is insufficient to establish the existence of a partnership between a mother and her son, considered.

SWEETSER v. DAVIS ..... 398

— *Negligence*—application by the defendant to take the testimony of the attending physician of the plaintiff—the court will not anticipate a possible condition on the trial which would make it competent—testimony of the plaintiff's physician as to her declarations concerning the circumstances of the accident.

See ENRIGHT v. BROOKLYN HEIGHTS R. R. CO. .... 538

— *Misappropriation of trust money*—an action for its recovery is an equitable action—the misappropriation only need be proved by the plaintiff—defense of its repayment or of a release rests on the defendant—notice—inquiry required.

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— *Subornation of perjury*—proofs of acts and declarations of conspirators, out of each other's presence, is admissible—proof of attempts to induce others to swear falsely—cross-examination as to collateral matters.

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- *Eminent domain—the taking of land used for business purposes—the general character of the business, but not its profits, may be proved—the owner may prove the value of the land as used for any purpose.*  
*See MATTER OF GILROY.* ..... 814
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- *Agreement by a wife to pay her husband one-half of the profits on a purchase and sale of real estate—proof required and consideration necessary to sustain it.*  
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- *Negligence—a person injured by falling, at night, over a stump in a city street—when proof of similar prior accidents is competent.*  
*See LUNDBECK v. CITY OF BROOKLYN.* ..... 595
- *Rule of construction of evidence where a party is in possession of the subject-matter of a negative averment.*  
*See BENNETT v. EDISON ELECTRIC ILL. Co.* ..... 863
- *Negligence—a child run over when stepping off a street car—verdict contrary to the weight of evidence.*  
*See FRICK v. METROPOLITAN STREET R. Co.* ..... 84
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*See LYONS v. N. Y. ELEVATED R. R. Co.* ..... 57
- *Negligence—subsequent admissions of a foreman not in the course of his employment—failure to object to incompetent evidence.*  
*See PFEFFER v. STEIN.* ..... 535
- *Presumption that a mailed letter was received—a denial of its receipt by a party in interest presents a question for the jury.*  
*See MORAN v. ABBOTT.* ..... 570
- *Libel—new libelous matter, not connected with the libel sued for nor inquired into, cannot be pleaded in mitigation of damages.*  
*See HESS v. NEW YORK PRESS Co.* ..... 73
- *Condemnation commissioners may form an opinion of value from a personal inspection—variance from the values sworn to.*  
*See MATTER OF DALY* ..... 326
- *Police board of the city of New York—a conviction reversed as against the weight of evidence.*  
*See PEOPLE ex REL. WALKER v. ROOSEVELT.* ..... 183
- *A note valid in its inception—burden of proof as to its diversion from the purpose for which it was given.*  
*See BLAIR v. HAGEMeyer* ..... 219
- *Expert testimony as to oscillations of cars a month after an accident.*  
*See SCHMIDT v. CONEY ISLAND & B. R. R. Co.* ..... 391
- *Testimony as to the value of the good will of a partnership.*  
*See KIRKMAN v. KIRKMAN.* ..... 895

**EXCEPTION** — *On a trial.**See* TRIAL.

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**EXECUTION** — *Levy upon property of which the judgment debtor is a tenant in common — remedy of the co-tenant where the sheriff sells the entire property.*] Where a bill of sale to two vendees is valid as to one and invalid as to the other of them, a levy may be made by a sheriff, under an execution against the vendor, upon, and he may take possession of, the common property; in such a case the vendee whose title is valid, being a co-tenant with his vendor, cannot maintain an action of replevin against the sheriff for the property levied upon, although it seems that he may, if the sheriff assumes to sell the entire property, maintain an action of conversion against him.

HENDERSON v. BRENNER. . . . . 309

**EXECUTOR AND ADMINISTRATOR** — *Bona fide transferee of negotiable paper.*] The receipt by brokers of a check drawn on a bank by a customer "as trustee" and deposited with the brokers in an account with this customer "as trustee," and proof that a subterfuge to withdraw the money from the category of trust funds was resorted to by a repayment of the money by a check drawn by the brokers to the trustee, who immediately deposited the proceeds of such check with the brokers, were considered to be sufficient evidence of notice on their part of the trust character of the money. MARSHALL v. DE CORDOVA. . . . . 615

— *Will — an imperative power of sale, although discretionary as to the time and circumstances of its exercise by executors, passes to an administrator with the will annexed.*

*See* CARPENTER v. BONNER. . . . . 462

— *Sheriff of New York — liability of his executrix and sureties for fees not paid over under chapter 523 of 1890 — constitutionality of that act — estoppel to deny its validity.*

*See* MAYOR v. GORMAN. . . . . 191

— *Action against a sheriff — executors of his indemnitors cannot be substituted in his stead — the statute construed in analogy to the common law.*

*See* BUCHNER & CO v. TAMSEN. . . . . 612

— *Next of kin, for whom an executor may sue — effect of the death of the next of kin before the trial.*

*See* MUNDT v. GLOKNER. . . . . 123

— *Deed by an executor under a power of sale of land held adversely — specific performance not decreed.*

*See* BULLARD v. BICKNELL. . . . . 319

**EXPERT** — *As a witness.**See* WITNESS.**FACTOR :***See* PRINCIPAL AND AGENT.**FACTORY ACT** — *Employment in violation of.**See* NEGLIGENCE.

**FALSE IMPRISONMENT** — *Malicious prosecution — when the question of probable cause is for the court — alteration of the charge after the arrest — there must be probable cause for preferring the new charge.*

*See* FRANCIS v. TILYU. . . . . 340

**FALSE REPRESENTATION** — *Action for false representations — a defendant admitting the fraud cannot interpose a counterclaim.*] The complaint in an action alleged that the defendant by false statements induced the plaintiff to invest money in the stock and bonds of a foreign corporation to his damage. The answer admitted that the statements made were false, and attempted to interpose a defense in the nature of a counterclaim, to which the plaintiff demurred.

*Held*, that the plaintiff's cause of action being in tort a counterclaim could not be interposed to the complaint, and that the demurrer should be sustained.

HAUPT v. AMES. . . . . 550

**FIRE** — *Insurance against.**See* INSURANCE.

**FORECLOSURE** — *Of liens.*

*See* LIEN.

— *Of mortgages.*

*See* MORTGAGE.

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**FRAUD** — *Action in equity to set aside alleged fraudulent transfers of a life insurance policy — on a failure to establish an equitable cause of action a money judgment at law is improper — a defendant cannot by answer interject into the equitable action a new legal cause of action for conversion available only against co-defendants and enable the plaintiffs to recover judgment thereon.*

*See* TOPLITZ v. BAUER..... 125

— *Pleading — application for an order of arrest for fraud — the facts constituting the fraud must be stated.*

*See* HARRISBURG PIPE BENDING CO. v. WELSH..... 515

— *Use of a business name — injunction to prevent another person from assuming it.*

*See* CHURCH v. KRESNER..... 349

— *An assignment not set aside for frauds upon it.*

*See* SWEETSER v. DAVIS..... 398

*See* FALSE REPRESENTATION.

**FRAUDULENT CONVEYANCE** — *To secure bona fide indebtednesses — to make fraudulent conveyances void, the creditors must have participated in the fraud.]* 1. In order that an ulterior purpose, upon the part of a debtor, who has made conveyances of and created incumbrances upon his property for the purpose of securing bona fide indebtednesses, to reserve to himself the control and possession of the property transferred or incumbered until the creditors so secured should enforce their rights under the instruments, shall render the transfers void, the intent must have been shared by the creditors, or those acting for them. *SOMMERS v. COTTENTIN*..... 241

2. — *Effect of a provision that the surplus is to be returned to the debtor, and of the debtor's remaining in possession.]* The fact that some of the instruments provide that, in certain events of default, the surplus arising shall be given to the debtor, and that he shall remain in possession of the property covered by the chattel mortgages until default shall be made thereunder, does not invalidate the transfers nor impute to the creditors an assent to or complicity in the ulterior purpose of the debtor. *Id.*

3. — *Effect of the debtor and creditors being represented by the same attorneys.]* The fact that the attorneys for the debtor were also the attorneys for the creditors is insufficient to show knowledge upon the part of the creditors of the debtor's fraudulent intent, where it does not appear that the attorneys knew of such intent. *Id.*

4. — *A wife charged with notice of her husband's fraudulent intent.]* The wife of a debtor, to whom the debtor has transferred a portion of his property for the purpose of defrauding his creditors, is chargeable with knowledge of her husband's guilty purpose where it appears that she took no part in the transaction personally, but constituted her husband her agent in regard to the matter, and was perfectly content to let her husband do what he pleased in regard to the property. *Id.*

5. — *Presumption from there being no change of possession.]* *Semble*, that the presumption of fraud in a sale of personalty, resulting from the fact that the possession of the articles transferred was not changed, may be rebutted by proof that the transfer was made in good faith, without any excuse being shown for there having been no change of possession of the articles under the transfer. *Id.*

— *Creditor's action to set aside a conveyance from a husband to his wife — presumption of fraud — failure of proof that the husband was insolvent and was indebted to the plaintiff when the conveyance was made.*

*See* ALLEE v. SLANE..... 455



**FRAUDULENT CONVEYANCE**—*Continued.*

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— *Action in ejectment to recover land, alleging that a deed and will were executed by fraudulent inducement— not changed into an equitable one by a demand for unnecessary equitable relief.*

See **BENNETT v. VONDER BOSCH** ..... 311

— *Creditor's suit— assignment made by a corporation after a fraudulent transfer of its property— assignee enjoined from disposing of property— authority for bringing the suit.*

See **KOECHL v. LEIBINGER & OEHM BREWING CO.** ..... 573

— *Action to set aside transfers of a life insurance policy— a money judgment is improper where an equitable cause of action is not established.*

See **TOPLITZ v. BAUER.** ..... 125

— *Conveyance by a husband to his wife in consideration of a loan of moneys which had been paid by the husband to the wife for services.*

See **BIRDSALL, WAITE & PERRY CO. v. SCHWARZ.** ..... 343

**FRIVOLOUS PLEADING:**

See **PLEADING.**

**GENERAL ASSIGNMENT:**

See **ASSIGNMENT.**

**GOOD WILL**— *Testimony as to the value of the good will of a partnership.*

See **PARTNERSHIP.**

**GOVERNMENT CONTRACT:**

See **CONTRACT.**

**GUARDIAN AND WARD**— *Where a father, a tenant by the curtesy and guardian in socage, acquires real estate left by his deceased wife, by means of a mortgage foreclosure occasioned by his default in payment of interest, his title is marketable.*

See **KULLMAN v. COX.** ..... 153

**HABEAS CORPUS**— *Liquor Tax Law— an offender against its provisions cannot be sentenced to an imprisonment of one day for each dollar of the fine unpaid— discharge under a writ of habeas corpus.*

See **PEOPLE v. STOCK.** ..... 564

**HEALTH BOARD**— *Suit to restrain its action— an answer, stating simply that its order was made in good faith, is demurrable.] 1. Where an action is brought against the health department of the city of New York and the individual members of that board to compel the revocation of certain orders enjoining the plaintiff from using buildings leased by him as a human habitation, without a permit from the health board, condemning the buildings and requiring the plaintiff to remove them, the complaint also asking for an injunction and rental damages, an answer interposed by the individual members of the board of health to so much of the complaint as demands damages against them, which merely alleges that the acts done by the individual defendants were done by them "in good faith, with ordinary discretion, and with evidence before them sufficient to justify their action, and in the due, ordinary and necessary performance of their duties as public officers," and states no facts from which the court can determine the accuracy of that conclusion and presents none of the evidence, alleged to be sufficient, upon which the members acted, is demurrable.*

See **SBARBORO v. HEALTH DEPARTMENT.** ..... 177

2. — *Such answer is not made good by § 599 of chap. 410 of 1882.] Section 599 of the Consolidation Act (Laws of 1882, chap. 410), which provides that no member of the board of health shall be held to liability for an act done or omitted, in good faith and with ordinary discretion, on behalf of or under the board of health, or pursuant to its regulations, ordinances or the health laws, does not change the rule relating to pleadings which requires a statement of facts showing that the case is within the statute, although the statute itself may not be referred to. *Id.**

**HEALTH BOARD — Continued.**

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3. — *Application and constitutionality of § 599 of chap. 410 of 1882.* *Quare*, whether section 599 is not limited, in its application, to a single act of destruction or injury which can be redressed in an action at law. *Quare*, whether it is constitutional. *Id.*

4. — *Salaried health officer — when not entitled to charge for services rendered to smallpox patients.* The health officer of a municipality, whose board of health was given power by statute (Laws of 1892, chap. 182, §§ 220, 221) to prescribe regulations for vaccination; to prevent persons infected with contagious diseases from entering the city; to provide for the removal to a hospital or pest house of all persons suffering from, or who had been exposed to, contagious diseases, and to prescribe the duties of its health officer, personally attended a smallpox patient although authorized by the board of health, of which he was a member, to employ a special physician for that purpose, and also attended a similar patient of whom he was directed by the board to take charge.

*Held*, that he was not entitled to compensation, in excess of his salary, for such services on the ground that they were in addition to his official duties and were extra hazardous;

That such duties were within the scope of the duties devolved upon him by his employment, and in direct relation to the obligations growing out of the position which he held. *REYNOLDS v. CITY OF MOUNT VERNON*. . . . . 581

**HEIR — Right to inherit.**  
*See* DESCENT.

**HIGHWAY — What is not an abandonment of it.** The nonuser of a portion of the width of a highway does not, where a sidewalk for foot passengers has at all times existed over the entire length of the highway in question, amount to an abandonment of the highway within the terms of 2 Revised Statutes (8th ed.), 163, section 160.

*Semle*, that a highway may be shifted to one side in such a manner and to such an extent as to create an abandonment.

*MANGAM v. VILLAGE OF SING SING*. . . . . 464

**HUSBAND AND WIFE — Alimony — when the objection that the defendant is unable to pay it will not be sustained.** 1. Although the report of a referee, appointed upon an application made by a husband for the reduction of alimony (of twenty dollars a week) directed to be paid by him in a suit for a separation, states that he is financially unable to pay any alimony, the Appellate Division will not interfere with a direction that he pay ten dollars per week, where it appears that the fees of the attorney employed by him upon the application and the cost of printing the papers used upon the appeal amount to enough to have paid all alimony directed to be paid by the order, from the time of the rendition of the judgment to the present time.

*KABATCHNICK v. KABATCHNICK*. . . . . 292

2. — *Order granting counsel fees and alimony at the same rate as the husband had previously agreed to pay the wife.* Where an action brought by a wife against her husband for a separation is discontinued upon the execution of a sealed agreement, by the terms of which the husband agrees to pay his wife a fixed sum per week for her maintenance, as well as certain counsel fees, and that, upon his default, she may recommence the action for a separation and petition any court of competent jurisdiction for alimony and counsel fees, and the wife, upon the husband's failure to perform the agreement, begins another action for a separation, an order made therein requiring the husband to pay alimony and counsel fees at substantially the same rate as he had agreed to pay will not be disturbed.

*VAN GIESON v. VAN GIESON*. . . . . 347

3. — *Conveyance by a husband to his wife in consideration of a loan of moneys which had been paid by the husband to the wife for services.* *Semle*, that where a husband at a time when he is perfectly solvent agrees to pay his wife a certain sum from week to week for services rendered by her in a business conducted by the husband, the money, when paid to the wife, becomes part of her separate estate, and the loan of it to her husband fur-

**HUSBAND AND WIFE**—*Continued.*

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nishes a sufficient consideration for conveyances subsequently made in contemplation of insolvency by the husband to the wife.

BIRDBALL, WAITE & PERRY CO. v. SCHWARZ..... 348

— *Creditor's action to set aside a conveyance from a husband to his wife — presumption of fraud — failure of proof that the husband was insolvent and was indebted to the plaintiff when the conveyance was made.*

See ALLEE v. SLANE..... 455

— *Agreement by a wife to pay her husband one-half of the profits on a purchase and sale of real estate — proof required and consideration necessary to sustain it.*

See GOUGE v. GOUGE..... 154

— *Fraudulent conveyances — a wife charged with notice of her husband's fraudulent intent.*

See SOMMERS v. COTTENTIN..... 241

— *Bailment — delivery to the husband of the bailor — liability therefor.*

See MARKOE v. TIFFANY & CO..... 95

**ICE** — *Mechanics' liens — when an ice-making plant may be made the subject of a lien.*

See NASON ICE MACHINE CO. v. UPHAM..... 420

**IDIOT:**

See INSANE.

**IMBECILE:**

See INSANE.

**INDEMNITY** — *To sheriff making a levy.*

See SHERIFF.

**INFORMATION AND BELIEF** — *Denial on.*

See PLEADING.

**INHERITANCE:**

See DESCENT.

**INJUNCTION** — *Review of an order by a co-ordinate branch of the same court.] 1. Only unusual conditions, such as fraud or collusion, can justify a co-ordinate branch of the same court in reviewing an order already made by that court. CORBIN v. CASINA LAND COMPANY..... 408*

2. — *Renewal of a motion for an injunction, made on an amended complaint, regarded as a new application.] After the denial of a motion for an injunction in an action, an application for an injunction subsequently made upon an amended and supplemental complaint, framed upon a different theory, raising new issues and demanding new relief, is to be regarded as an original application and not as a review of the order previously made. Id.*

3. — *Security which may be demanded on granting it.] An order, modifying an injunction order, by directing the plaintiff to file an undertaking conditioned to pay any indebtedness which may be found due to the defendants, either in the pending action or in any other action or proceeding in which the same may be determined, is too broad; it should be limited to any amount which was the subject of the controversy or any amount which arose out of, or was connected with, it. Id.*

— *Action by a taxpayer to prevent waste — injunction to restrain an electric company from unlawfully excavating in a public park in order to set poles — failure to allege that city officials intend to do an unlawful act.*

See SHEEHY v. McMILLAN..... 140

— *Action by "The Commercial Advertiser" to restrain the use of the name "New York Commercial" by another newspaper.*

See COMMERCIAL ADV. ASSN. v. HAYNES..... 279

— *Injunction dependent upon the cause of action — the right thereto must appear in the complaint.*

See SANDERS v. ADER..... 176

**INJUNCTION** — *Continued.*

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— *Use of a business name— injunction to prevent another person from assuming it.*

See **CHURCH v. KRESNER**..... 849

**INJURY:**

See **NEGLIGENCE.**

**INSANE** — *Power of the court to make an adequate allowance to an attorney defending proceedings de lunatico inquirendo.*

See **MATTER OF HARDY**..... 184

**INSURANCE** — *Life insurance— waiver of a cash payment of the premium— estoppel.*] 1. Where a life insurance company has, on several occasions, allowed a person to solicit policies for it, and has permitted him to deliver them without exacting payment in cash on the delivery of the premium receipt, as required by the terms of the policy, it constitutes him its agent with authority to waive the condition requiring payment in cash; and where such agent accepts in return for a policy notes of the son of the insured, and, within a week thereafter, accepts for the notes the check of the wife of the insured, and thereupon delivers the premium receipt, the insurer is estopped from subsequently denying the due receipt of the premium.

**TOOKER v. SECURITY TRUST CO.**..... 372

2. — *Omission from a health certificate of a consultation with a physician for a trivial sore on the head.*] A failure to embody in a health certificate, accompanying the application for the insurance, a statement made to the agent by the insured that he had been treated by a physician for an unimportant sore on his head, does not constitute a breach of a warranty contained in the application in the technically untrue answer to a question therein as to who was the last physician consulted by the insured. The simple omission of a trivial fact of this kind will not vitiate a policy, particularly where the policy indicates that an omission, which will constitute a breach, must be intentional and fraudulent, and where the policy does not by its terms constitute the soliciting agent the agent of the insured. *Id.*

3. — *Effect of paying another policy upon the same life under the same state of facts.*] *Semble*, that where the insurer, with full knowledge of the facts, pays one of two policies, issued upon the same life and substantially upon the same application, there is a waiver of any invalidity or insufficiency of the proofs of death under the other policy. *Id.*

4. — *Mutual insurance companies— under what provision of the Insurance Law their right to continue business is to be determined by the superintendent.*] The question as to the continuance in business of a mutual insurance company is to be determined by the Superintendent of the Insurance Department under section 48 of the Insurance Law (Laws of 1892, chap. 690). Section 41 of that act does not apply at all, and section 118 applies only in part to a mutual insurance company.

**PEOPLE EX REL. LONG ISLAND MUTUAL v. PAYN**..... 584

5. — *Stock and mutual corporations considered.*] The distinction, in this regard, between companies having "capital stock" and mutual insurance companies having only "assets or capital," considered. *Id.*

6. — *Rule as to assets sufficient to authorize continuance of business.*] It seems, that a mutual insurance company should not be allowed to continue in business, merely because it has some surplus of assets over liabilities. *Id.*

7. — *Examiners' report.*] The duties of examiners of a mutual insurance company and the proper contents of the report to be made by them to the Superintendent of Insurance, considered. *Id.*

8. — *Fire insurance policy— notice of its cancellation by the insurer— an offer in the notice to return the unearned premium on surrender of the policy is sufficient, without an actual tender thereof.*] Where a policy of fire insurance provides that the insurer may cancel it upon five days' notice to the insured, and that if it be so canceled any unearned portion of the premium actually paid shall be returned to the insured upon the surrender of the policy or of its last renewal, an actual and formal tender of the unearned pre-

**INSURANCE** — *Continued.*

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mium by the company, at the time of service of the notice, is not essential to a cancellation of the policy on its part, where the notice states that such unearned premium will be paid when the surrender is made.

BACKUS v. EXCHANGE FIRE INS. CO. .... 91

— *Action in equity to set aside transfers of a life insurance policy — on a failure to establish an equitable cause of action, a money judgment at law is improper — a defendant cannot, by answer, interject into the equitable action a new legal cause of action for conversion available only against co-defendants and enable the plaintiffs to recover judgment thereon.*

See TOPLITZ v. BAUER. .... 125

**INTERPLEADER** — *When proper.*

See PLEADING.

**INTOXICATING LIQUOR** — *Liquor Tax Law — an offender against its provisions cannot be sentenced to an imprisonment of one day for each dollar of the fine unpaid.*] 1. The provisions of sections 484 and 718 of the Code of Criminal Procedure, providing that a judgment which imposes a fine may also direct that the criminal be imprisoned until the fine be paid, for a term not to exceed one day for each dollar of the fine, are not applicable to a conviction under the Liquor Tax Law (Laws of 1896, chap. 112, § 34) which makes a sale of liquor by one not having a liquor tax certificate a misdemeanor, punishable by fine and imprisonment, but contains no specific authority to sentence the criminal to imprisonment for non-payment of the fine, the latter statute being designed to cover the whole subject, both prescribing the punishment and the manner in which the fine shall be collected.

PEOPLE v. STOCK. .... 564

2. — *Discharge under a writ of habeas corpus.*] Where in such a case a sentence of imprisonment has been imposed for the non-payment of the fine, the prisoner may be released under a writ of habeas corpus. *Id.*

**IRRELEVANT PLEADING** — *Irrelevant allegations in a reply — stricken out.*

See PLEADING.

**ISSUES** — *Trial of.*

See TRIAL.

**JUDGMENT** — *Estoppel by judgment — how far a matter must have been passed upon to preclude its consideration in a second suit.*] 1. The failure of a party who has obtained judgment in an action, brought by him to set aside a conveyance of real property alleged to have been obtained from him by fraud, to ask in that action for the recovery of the rents collected by the defendant while in the wrongful possession of the property, does not, in the absence of proof that the question of rentals was passed upon in deciding such action, or that the right of the owner to such rents was necessarily involved in the determination or merged in the judgment therein, estop him from maintaining a subsequent action against the defendant for such rents.

MCCARTHY v. HILLER. .... 588

2. — *Estoppel of a former judgment — that the same issue was involved must be proved by the person who alleges it.*] It is incumbent upon a party setting up the estoppel of a former judgment between the parties to show that the matter, as to which the former judgment is claimed to be an estoppel, was necessarily involved in the rendition of the former judgment.

ROWLAND v. HOBBY. .... 522

3. — *The charge of the judge to the jury is competent evidence on that question.*] It seems, that the charge of the court to the jury is competent to show the precise issues passed upon by the jury. *Id.*

— *Corporation — binding force of a former adjudication that a consolidation of companies was valid.*

See DRAKE v. NEW YORK SUBURBAN WATER CO. .... 499

**JUDICIAL SALE** — *Judgment directing the sale for cash of premises upon which legacies are charged — right of legatees who purchase to have their legacies credited upon the purchase price.*] An interlocutory judgment, entered

**JUDICIAL SALE**— *Continued.*

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in an action to which all the persons interested in an estate were made parties, adjudged that certain legacies were specific charges upon the premises in question, and directed that such premises be sold for cash; that the costs, disbursements, fees and commissions be deducted, and that the balance be distributed as directed by the final judgment. The premises were accordingly sold and were bid in at the sale for four of the legatees.

*Held*, that, upon an application by all of the interested parties, the Special Term had power to make an order requiring the referee who conducted the sale to file his report of sale to the four legatees, upon the payment to him in cash of a sum sufficient to cover the costs and the expenses of the sale, and to receive as cash the receipts of the four legatees for such portions of their respective legacies as should equal the balance of the purchase price.

See *TODD v. TODD*..... 294

**JUSTIFICATION**— *In an action for libel.*

See *LIBEL*.

**LACHES**— *Estoppel created by the acquiescence of a stockholder in the acts of a corporation.*] It is the duty of a stockholder, if he desires to set aside acts of the corporation, to act promptly, and in failing to do so he becomes bound by his acquiescence therein, and is estopped from asserting any right as against a person who has in good faith dealt with the corporation and received its securities.

A delay of several years held to be fatal.

*DRAKE v. NEW YORK SUBURBAN WATER CO.*..... 499

— *Leave to serve an amended answer*— laches in making the application.

See *GERDAU v. FABER*..... 606

**LAND:**

See *REAL PROPERTY*.

**LANDLORD AND TENANT**— *A written sealed lease—a prior parol promise by the landlord to make repairs is merged in it.*] 1. An oral agreement, made prior to the execution of a written lease, under seal, for five years, containing no covenant binding the landlord to repair, and apparently on its face embracing the entire understanding of the parties to it, by the terms of which oral agreement the landlord undertakes to make certain repairs during the term, must be deemed to have been merged in the lease, and cannot, in an action brought to recover rent due under the lease, in which the tenant sets up the breach of this oral agreement as a counterclaim or defense, be proved by the tenant as an independent collateral promise.

*HALL v. BESTON*..... 105

2. — *A promise during the term to repair if the tenant would remain in without consideration.*] A promise by the landlord, made during the term and when the tenant threatened to remove from the premises, that if he would remain the landlord would make the repairs in question, is not enforceable, there being no consideration to support it. *Id.*

3. — *Promise of a landlord to repair a ceiling—personal injury to the tenant from its breach—liability of the landlord.*] A contract made by a landlord with his tenant to repair a ceiling in the demised premises, in reliance upon which the tenant renews her lease of the premises, does not create a liability on the part of the landlord for personal injuries sustained by the tenant through its breach and the consequent fall of the ceiling upon her.

*SCHICK v. FLEISCHHAUER*..... 210

4. — *Remedy of the tenant.*] Remedy of the tenant in the event of the breach by the landlord of a promise to repair, considered. *Id.*

— *Corporation—guaranty of a lease, executed by a brewing company in consideration of the lessee's promise to buy beer from the company—the plea of ultra vires cannot be asserted—sealed instrument expressing a consideration.*

See *KOEHLER & CO. v. REINHEIMER*..... 1

— *Negligence—alterations in a building made by a tenant—liability of the tenant making them and of the owner of the building to another tenant injured by the fall of the building—expert testimony on the subject.*

See *QUIGLEY v. JOHNS MANUFACTURING CO.*..... 484

**LANDLORD AND TENANT** — *Continued.*

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— *Mechanic's lien — repairs ordered by a tenant who is to be made an allowance for them out of the rent — they are made with the consent of the owner.*

See *McLEAN v. SANFORD*. . . . . 608

— *Authority of an agent to execute a lease for more than a year — it must be in writing.*

See *GRIFFIN v. BAUST*. . . . . 558

**LEASE:**

See **LANDLORD AND TENANT**.

**LEGACY** — *Judgment directing the sale for cash of premises upon which legacies are charged — right of legatees who purchase to have their legacies credited upon the purchase price.*

See *TODD v. TODD*. . . . . 294

**LETTER** — *Presumption that a mailed letter was received — a denial of its receipt by a party in interest presents a question for the jury.*

See **EVIDENCE**.

**LEVY** — *Under an execution.*

See **EXECUTION**.

**LIBEL** — *A justification must be as broad as the libel.] 1. A justification must be as broad as the libelous charge, and where the publisher fails to prove many material details of it, the justification is insufficient.*

*YOUNG v. FOX*. . . . . 261

2. — *Charges made against a married woman.] An article, published of a married woman and illustrated with pictures, in which, although she is described as the victim of a plot concocted by her husband to procure evidence available for a divorce, it is falsely charged that she went voluntarily with another man into a hotel bedroom and, after having remained there some time, went with him into the hotel restaurant; that she returned to and remained with him in the bedroom two hours, during which time wine was served; that about midnight her enraged husband broke the door in and found her reclining upon a bed, and that her alleged paramour escaped in his shirt sleeves, is libelous per se. *Id.**

3. — *Malice.] Malice may be inferred and punitive damages be awarded where a libel is recklessly published as well as where its publication is induced by personal ill-will; and the fact that a weekly newspaper circulates, in advance of publication, "dodgers" or circulars, calling local attention to the fact that an upcoming issue will contain an article relative to a woman which is libelous per se, is some evidence that the publication was deliberate, and that an opportunity had been afforded for making an inquiry as to the truth of the account about to be published. *Id.**

4. — *Evidence in mitigation cannot reduce compensatory damages.] Evidence in mitigation extends only to punitive, and has no bearing upon compensatory, damages. *Id.**

5. — *What erroneous charge is insufficient for a reversal.] A verdict will not be set aside merely because the court, in its charge, said to the jury that the publisher admitted that he had caused a certain circular or "dodger" to be "widely" circulated, when his admission was in fact that it was circulated, unless the attention of the court is specifically called to its improper use of the word "widely." *Id.**

6. — *New libelous matter, not connected with the libel sued for nor inquired into, cannot be pleaded in mitigation of damages.] Where the complaint in an action for libel alleges the publication of articles containing general charges that the plaintiff, a candidate for member of Congress, was not "a decent candidate" nor "able and clean in his private and public character," the defendant cannot, in alleged mitigation of damages, insert in its answer, for the purpose of disproving express malice and showing probable cause, new allegations made upon information derived from third parties, as to the truth of which it made no inquiries and for which it does not vouch, to the effect that, prior to its publication of the libel, it was informed that*

**LIBEL** — *Continued.*

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the plaintiff had offered, in connection with the remission of a personal tax, to bribe a public officer, and that he had also embezzled moneys of an estate. *Hess v. NEW YORK PRESS CO.* . . . . . 78

**LIEN** — *Mechanics' liens — the time to file a lien is not extended by slight repairs ordered and made four months after the completion of the original contract.*]  
1. The statutory period of ninety days after the completion of a contract, within which a mechanic's lien must be filed, cannot be extended by proof that, about four months after the work had been done, and after the contractor had taken a note for a balance due for such work, the contractor was ordered to make a very slight repair which was not made in continuance of the original contract. *McLEAN v. SANFORD* . . . . . 608

2. — *Repairs ordered by a tenant who is to be made an allowance for them out of the rent — they are made with the consent of the owner.*] It seems, that where a lease stipulates that the tenant may retain, from his own rent and that of another tenant payable to him, a definite amount for repairs and renovations, repairs made in pursuance thereof, to the extent in cost of the limit fixed, are made with the consent of the owner within the meaning of the Mechanics' Lien Law (Laws of 1885, chap. 342, § 1, as amended by the Laws of 1888, chap. 316). *Id.*

3. — *Mechanics' liens — when an ice-making plant may be made the subject of a lien.*] An ice making plant is not, in terms, embraced within the statute relative to mechanics' liens (Laws of 1885, chap. 342, as amended by Laws of 1895, chap. 673); but where the court, upon the trial of an action brought to foreclose a lien filed to secure payment for such a plant, finds that the work and materials in question "were used in the erection and construction of said plant upon the aforesaid premises and in the erection and alteration of the buildings upon said premises," and it further appears from the evidence that the plant was annexed to the freehold by masonry in such a manner that the building would have to be taken to pieces to remove it, the lien may be sustained, and a dismissal of the complaint is improper.

*NASON ICE MACHINE CO. v. UPHAM.* . . . . . 420

— *Mortgage foreclosure — the costs are a necessary incident to the mortgage lien — they are enforceable out of surplus moneys in the same manner as the debt itself.*

*See BUSHWICK SAVINGS BANK v. TRAUM.* . . . . . 532

— *Construction, in an action brought to enforce a factor's lien, of a compromise agreement of sale as to goods delivered to a factor.*

*See SPAULDING v. AMERICAN WOOD BOARD CO.* . . . . . 237

**LIFE INSURANCE:**

*See INSURANCE.*

**LIMITATION OF ACTION** — *Action against a director for a failure to file an annual report — leave to serve an amended answer setting up the Statute of Limitations — merits of the proposed answer not considered — laches in making the application.*

*See GERDAU v. FABER.* . . . . . 606

— *When an action is for specific performance, governed by the ten-year Statute of Limitations, and not to remove a cloud on title, against which the statute never runs.*

*See PURDY v. COLLYER.* . . . . . 338

**LOAN** — *Railroad corporations — execution of a mortgage to secure bonds — limitations of the power to borrow money.*

*See RAILROAD.*

**LONG ACCOUNT** — *What justifies a reference on the ground that the trial of the action will involve the examination of a long account.*

*See REFERENCE.*

**LUNATIC:**

*See INSANE.*



**MACHINERY** — *Dangerous to employees.**See* MASTER AND SERVANT.— *When the machinery of a corporation is taxable as "land."**See* TAX.**MALICE** — *In an action for libel.**See* LIBEL.

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**MALICIOUS PROSECUTION** — *When the question of probable cause is for the court.*] 1. Where, in an action brought to recover damages for an alleged malicious prosecution, there is no dispute concerning the facts upon which the defendant acted in causing the arrest of the plaintiff, the question of probable cause is for the court. FRANCIS v. TILLYOU..... 840

2. — *Facts constituting probable cause.*] The fact that the defendant was informed by his watchman that the plaintiff had made two attempts to break into the defendant's bath houses constitutes probable cause for the defendant's making a complaint and having the plaintiff arrested. *Id.*

3. — *Alteration of the charge after the arrest — there must be probable cause for preferring the new charge.*] Where, however, the defendant, after the plaintiff's arrest, upon the suggestion of the magistrate that the charge of burglary, or of attempted burglary, is too severe, alters the charge to one of vagrancy, the subsequent detention and trial of the plaintiff upon the charge of vagrancy can be justified only by proof that the plaintiff was, as matter of fact, guilty of that offense; and in case the proof as to whether the plaintiff was guilty of vagrancy be inconclusive and conflicting and he be finally acquitted, the jury in the action for malicious prosecution are justified in finding that the defendant did not have probable cause for preferring the charge of vagrancy, and a motion to dismiss the complaint is properly denied. *Id.*

**MANDAMUS** — *To review the action of a club in expelling a member.*] When a member of a club is entitled on the trial of the issues in mandamus proceedings to have submitted to the jury the question whether he had been given reasonable notice to defend himself upon the charge upon which he was expelled, *i. e.*, of making a willful or reckless misstatement in a circular, considered. PEOPLE EX REL. WARD v. UPTOWN ASSN..... 297

— *New York city — bills of an attorney designated to act in a proceeding to take property for the board of education — the taxation thereof by a justice of the Supreme Court is a judicial act.*

*See* PEOPLE EX REL. ALLISON v. BD. OF EDUCATION..... 208**MARKETABLE TITLE:***See* REAL PROPERTY.*See* SPECIFIC PERFORMANCE.

**MASTER AND SERVANT** — *Negligence — an owner, employing an independent contractor, is not liable for the negligence of such contractor or of fellow-servants — liability of an owner, who furnishes an insufficient foundation; who has employed a competent architect; where an architect alters the thickness of a foundation — effect of the New York Building Law.*

*See* BURKE v. IRELAND ..... 487

— *Negligence — a boy injured while assisting, contrary to the terms of his employment, in the use of a machine — failure of a foreman to secure loose parts of a machine — contributory negligence.*

*See* STIMPER v. FUCHS & LANG MANFG. COMPANY ..... 333

— *Negligence — voluntary exposure to danger — subsequent admissions of a foreman not in the course of his employment — violations of the Factory Act.*

*See* PFEFFER v. STEIN ..... 535

— *Negligence — selection by an employee of an unfit but not structurally defective machine — acceptance of an obvious risk — res ipsa loquitur.*

*See* PARENTO v. TAYLOR & COMPANY ..... 518

— *Negligence — an owner of a building is not liable for the negligence of independent contractors, employed to take it down, to their employee.*

*See* CULLOM v. MCKELVEY ..... 46

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— <i>Negligence — a servant of a janitor injured by the fall of a lift — liability of the owner of the building — duty of inspection.</i>	
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**MECHANIC'S LIEN:**

See *LIEN.*

**MISREPRESENTATION:**

See *FALSE REPRESENTATION.*

**MITIGATION** — *Pleadings in, of libel.*

See *LIBEL.*

**MORTGAGE** — *Surplus moneys — damages for a breach of contract secured by a subsequent mortgage — right of the referee to determine such damages — measure of damages.*] 1. The owner of premises in Sixteenth street in New York city conveyed them to contractors subject to an existing mortgage and agreed to take an additional mortgage for the remainder of the purchase price, and to make advances for the erection of buildings on the premises, such advances to be secured by mortgages to be given by the contractors. Two of such mortgages were given, one on the Sixteenth street property and one on premises owned by the contractors in Twelfth street, the latter being collateral to a bond conditioned that, in case the contractors should make good all damages which the grantor might sustain by reason of their failure to perform said building loan agreement or any part thereof as aforesaid, then the obligation should be void. Before the completion of the buildings the contractors failed, and the work was abandoned, and upon the foreclosure of the purchase-money mortgage on the Sixteenth street property there still remained an amount due the grantor for advances, the only security for which was the mortgage on the Twelfth street property.

Upon an appeal from the report of a referee appointed in proceedings to determine the disposition of the surplus money arising from the sale of the Twelfth street property, upon foreclosure of a prior mortgage thereon, which fund was claimed both by the assignees of the grantor holding the mortgage above mentioned and by the holders of a third and subsequent mortgage on the Twelfth street property, given to secure a debt of the contractors, it was *Held*, that the referee in such a proceeding had power to determine the amount of the damages secured by the mortgage given to the grantor;

That the rights of the grantor of the Sixteenth street property were fixed when the contractors abandoned their contract, and that he, having lost everything by way of security except the mortgage on the Twelfth street property, could claim under that mortgage all the ascertained damage directly consequent upon the breach of the condition of the bond to which it was collateral;

That he was entitled to the surplus money arising on the sale of the Twelfth street property to the extent of the advances made by him towards the improvement of the Sixteenth street property, secured by the mortgage on the Twelfth street property. *GUTWILLIG v. WIEDERMAN*..... 26

2. — *Mortgage foreclosure — the costs are a necessary incident to the mortgage lien — they are enforceable out of surplus moneys in the same manner as the debt itself.*] Costs awarded to a junior mortgagee in an action brought by her for the foreclosure of her mortgage, which action, by reason of the interposition of the defense of usury by the mortgagor, is not determined until after a sale of the mortgaged premises has taken place under a foreclosure of the senior mortgage, are a natural and necessary incident to the mortgage lien itself, and are payable, together with the amount due upon such second

**MORTGAGE**—Continued.

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mortgage, out of the surplus moneys arising from such sale under the foreclosure of the first mortgage. *BUSHWICK SAVINGS BANK v. TRACM.*..... 533

— *Trust*—when a trustee holding a mortgage has power to assign it and his assignee to receive the principal—the mortgagor is not bound to see that the money is properly applied.

See *SPENCER v. WEBER.*..... 285

— A payment on a recorded mortgage to one who negotiated the loan, but not shown to have had possession of the securities, is not protected.

See *FRANK v. TUOZZO.*..... 447

— When a mortgagor making a payment to the attorney of the owner of the mortgage is not protected in so doing—scrivener rule.

See *CENTRAL TRUST CO. v. FOLSOM.*..... 40

— Railroad corporations—execution of a mortgage to secure bonds—limitations of the power to borrow money.

See *FLYNN v. CONEY ISLAND & B. R. R. Co.*..... 416

— Notice of the appointment of a new trustee of a mortgage.

See *GRIFFIN v. BAUST.*..... 533

**MOTION AND ORDER**—Injunction order—review of an order by a co-ordinate branch of the same court—renewal of a motion for an injunction, made on an amended complaint, regarded as a new application—security which may be demanded on granting it.

See *CORBIN v. CASINA LAND COMPANY.*..... 408

— Bill of particulars, applied for on the ground that it is necessary to enable the defendant to answer—it cannot be granted upon the ground that it is necessary to enable the defendant to prepare for trial.

See *MCCLELLAN v. DUNCOMBE* ..... 353

— Decision of a motion to direct a verdict—exception thereto, how taken, when the decision is reserved—power of review by the appellate court.

See *ELLIOTT v. VAN SCHAICK.* ..... 587

— Reference—when a long account is not involved—review of a denial of a motion to refer.

See *ALLENTOWN ROLLING MILLS v. DWYER* ..... 101

**MUNICIPAL CORPORATION**—New York city—purchase of supplies—when a supply is “needful for any particular purpose” and the contract exceeds \$1,000, it must be awarded upon bids submitted after public notice—several orders each less than, but together exceeding, \$1,000 are within the statute.] 1. The provisions of the Consolidation Act applicable to the city of New York (Laws of 1882, chap. 410, § 64), in substance requiring that municipal supplies “needful for any particular purpose,” of which the several parts together shall involve an expenditure of more than \$1,000, shall be furnished to the city under contracts entered into by the appropriate heads of departments and, except where otherwise provided, shall be founded upon sealed bids or proposals submitted under a duly advertised public notice, preclude a recovery against the city by persons who, upon various days during a period of more than three months, have delivered butter (for use in, and which was actually used by, a municipal public institution), not under a contract made after public letting, but merely upon separate orders signed by the purchasing agent of the department of public charities and corrections, none of which orders exceeded \$500, but which, taken together, amounted to more than \$4,200. *WALTON v. THE MAYOR.*..... 76

2. — *Brooklyn*—its park commissioner has no power to maintain an action to prevent the maintenance of a steam railroad on Fort Hamilton parkway.] The park commissioner of the city of Brooklyn has no authority, under chapter 865 of the Laws of 1892, placing under his exclusive charge and management Fort Hamilton parkway, now in the city of Brooklyn, but formerly in the town of New Utrecht, to take proceedings to prevent the further maintenance and operation over the parkway, at grade, of a steam railroad which has been operated in the same manner upon such parkway for many years, in alleged violation of chapter 609 of 1871, as amended by

**MUNICIPAL CORPORATION** — *Continued.*

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chapter 551 of 1875, as the statute in question gives him no express or implied authority in the matter, nor does it transfer to him the right conferred on town highway commissioners by section 15 of the Highway Law (Laws of 1890, chap. 568) to enforce the performance of any duty enjoined upon any person or corporation in respect to any town highway.

PEOPLE EX REL. COCHEU v. DETTMER..... 327

3. — *Remedy where a railroad is operated in defiance of law.*] *Semble*, that if the railroad corporation is occupying and obstructing the parkway in defiance of the law, the remedy is by indictment for maintaining a public nuisance, or by an action in equity, by the Attorney-General, to restrain the continuance of the nuisance and abate it, or by an action by an individual, who has sustained a special or peculiar injury from the obstruction, in his own name, for an injunction. *Id.*

4. — *Police board of the city of New York—a conviction reversed as against the weight of evidence—a charge preferred as an afterthought after another charge had been dismissed.*] Where a roundsman of the police force of the city of New York, upon discovering a patrolman, while on duty, drinking from a glass which had been brought to him from a saloon, orders the patrolman to go to the station house, where the roundsman, upon a mere suspicion, prefers a charge of intoxication against him, and, upon learning the next day that the charge of intoxication had fallen through, at once charges the patrolman for the first time with using vile and insulting language to him upon the way to the station house, the testimony of the roundsman in support of the latter charge is open to grave suspicion; and where the only testimony in support of the charge is that of the roundsman, which is refuted by three unimpeached and apparently disinterested witnesses, a conviction of the patrolman upon that charge will be reversed as against the weight of evidence.

PEOPLE EX REL. WALKER v. ROOSEVELT..... 188

5. — *Police—dismissal of a policeman for misconduct—a conviction must precede it.*] A police board, after hearing the proofs taken under charges made against a member of the force, entertained a motion to dismiss the charges, but never decided it, and thereafter, without finding the accused guilty of the offense charged, passed a resolution dismissing him from the police force.

*Held*, that the right to dismiss the accused depended upon his being found guilty of some offense, and that the mere passing of a resolution dismissing him, without finding him guilty, was without effect.

PEOPLE EX REL. REIDY v. GRADY..... 592

— *Action by a taxpayer to prevent waste—injunction to restrain an electric company from unlawfully excavating in a public park, in order to set poles—failure to allege that city officials intend to do an unlawful act.*

See SHEEHY v. McMILLAN..... 140

— *Negligence—collision, by reason of a horse becoming frightened by a trolley car, with a city lamp post six inches inside the curb line—liability of the city—contributory negligence.*

See VAN WIE v. CITY OF MOUNT VERNON.... 330

— *Negligence—a vehicle upset by rubbish negligently placed in a street—misuse of a municipal consent to the placing of building materials in a street.*

See MEENAGH v. BUCKMASTER..... 451

— *Action for injuries caused by the negligence of a municipal corporation—a notice of intention to sue must be actually delivered—mailing is insufficient.*

See BURFORD v. THE MAYOR..... 225

— *Negligence—a person injured by falling, at night, over a stump in a city street—when proof of similar prior accidents is competent.*

See LUNDBECK v. CITY OF BROOKLYN..... 595

— *A street railroad company—it has a paramount right to that part of a street in which its rails are laid, between intersecting streets.*

See ROSENBLATT v. BROOKLYN HEIGHTS R. R. CO..... 600

— *Highway—what is not an abandonment of it.*

See MANGAM v. VILLAGE OF SING SING..... 464

**NAME**— *Use of a business name— injunction to prevent another person from assuming it.*

See **TRADE MARK**.

**NEGLIGENCE**— *Alterations in a building made by a tenant— liability of the tenant making them and of the owner of the building to another tenant injured by the fall of the building— expert testimony on the subject.*] 1. A manufacturing company, upon hiring the upper part of a building, some forty feet high, divided into two portions by a floor constituting the ceiling of the basement, put up a second floor, to furnish support for the beams of which it cut a series of holes four inches deep in pilasters sixteen inches thick forming part of the walls above the first story, thus leaving the pilasters at such points of the same thickness as the neighboring walls, viz., twelve inches; and upon the termination of its tenancy, in accordance with the terms of its lease, the manufacturing company removed the floor and beams and left the holes in the pilasters unfilled.

*Held*, that it could not be said to have created, by its act, an intrinsically dangerous nuisance, rendering it liable for the death of the tenant of the basement of the building, occasioned some time after the manufacturing company's removal by the collapse of the building during a heavy wind; that its liability, if any, arose out of its violation of its obligation as tenant not to alter the condition of that part of the premises which it occupied so as to injure other tenants in the same building;

That it was the duty of the owner of the building, upon regaining possession of the premises vacated by the manufacturing company, to use reasonable diligence to prevent the continuance of any condition created therein by the former tenant which there was reasonable cause to believe might occasion danger to the tenant who continued to occupy the other part of the premises;

That a jury might find that greater diligence was required of the landlord in ascertaining whether the premises were in a safe condition than would be demanded of the tenant— so that it would not follow that the tenant was guilty of contributory negligence in not appreciating a danger, for a neglect to ascertain which the owner would be guilty of negligence;

That upon the trial of an action brought by the administrator of the deceased tenant, to recover damages resulting from his death, an expert witness should be permitted to answer the question, "Now state what in your opinion was the cause of the falling of that building," and the further question, "Well, how in your opinion, did the force of the storm affect the building so as to cause it to fall— in what way."

QUIGLEY v. JOHNS MANUFACTURING CO. .... 431

2. — *Voluntary exposure to danger— subsequent admissions of a foreman not in the course of his employment— failure to object to incompetent evidence— violation of the Factory Act.*] On the trial of an action brought to recover damages resulting from the death of the plaintiff's intestate, who was employed to sort corks in a bicycle factory and was injured by being caught in shafting on which he had volunteered to shift a belt which he had reached by mounting upon a ladder, the foreman of the bicycle factory was asked whether he had not told the mother of the deceased "that he would not have told the boy to go up the ladder if he had thought he would be hurt," which he denied. Subsequently the mother and two other witnesses testified that he did make the statement. There was no other testimony which tended to show that the foreman gave any direction to the boy to shift the belt.

*Held*, that the testimony of the mother, as an impeachment of the denial of the foreman, was incompetent;

That as the declaration was not made within the scope of the foreman's employment by the defendants, the proprietors of the factory, it was not competent evidence of the principal fact alleged to have been stated by the foreman;

That the fact that no objection was made to the proof did not make it effective to create a liability on the part of the defendants;

That if it should be assumed that the deceased had been employed in violation of the Factory Act the result would not be different.

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3. — *Collision, by reason of a horse becoming frightened by a trolley car, with a city lamp post six inches inside the curb line—liability of the city—contributory negligence.*] In an action brought to recover damages resulting from the alleged negligence of the defendant, a municipal corporation, it appeared that while the plaintiff was driving a horse, which was somewhat restive when passing cars, along a street in the defendant city upon which trolley cars were operated, the horse became frightened by the loud and sudden ringing of the bell on an approaching car, and that his consequent movement brought the hind wheel on one side and the body of the wagon on the other side of a lamp post standing upon a street corner six inches inside the curb line, by reason of which the wheel was torn from the wagon and the plaintiff was injured.

*Held*, that the plaintiff was not guilty of contributory negligence, as matter of law, in driving the horse upon the street or in concluding to meet and pass the car;

That the lamp post having been erected in the prosecution of a public improvement which the city had power to authorize, the determination of the position in which it should be placed was within the discretion of the city, and that where such discretion was exercised in good faith the city could not be held liable for a failure to furnish more complete protection.

*Semble*, that even if the defendant's liability might be treated as one of fact, negligence could not be predicated of the manner in which the lamp post was set. *VAN WIE v. CITY OF MOUNT VERNON*,..... 330

4. — *A boy injured while assisting, contrary to the terms of his employment, in the use of a machine—failure of a foreman to secure loose parts of a machine—contributory negligence.*] A boy fifteen years of age was employed about a machine shop under an agreement between the proprietor of the machine shop and the boy's father that the boy was to be employed only in cleaning the shop, running errands and drilling holes, and was not to be placed at work upon any machine without the consent of his father. While assisting, under the direction of his employer's foreman, without the consent of his father, in operating a hydraulic pump, he was injured by the fall of some of the parts, which had become loosened, to the knowledge of the foreman, but which might have been secured by the use of a rope.

In an action brought by the boy against the proprietor of the machine shop to recover for the injuries thus sustained,

*Held*, that the jury were authorized to find that the defendant was guilty of negligence in permitting or directing the plaintiff to work about the machine, and also because of the foreman's neglect to properly secure the machine and protect the plaintiff;

That if there was any question of contributory negligence, it was one to be decided by the jury. *STIMPER v. FUCHS & LANG MANFG. COMPANY*.. 333

5. — *A woman injured at a railroad crossing—proof which requires the submission to the jury of the question of contributory negligence.*] In an action brought against a railroad company to recover damages for personal injuries sustained by the plaintiff at a railroad crossing on a village street where gates, which had been in use for a long time, were frozen and out of order, the plaintiff testified: "Before I got to the track I looked up the track and down around the curve. That was before I got to the track. I should think I was then five or ten feet from the track. I did not see any train coming in either direction. I did not hear any bell or whistle blown. I did not see any flagman. \* \* \* Then, after I started on, my attention was directed straight ahead, and the last I remember I was struck by this engine. \* \* \* I had known these gates there at the crossing for years. \* \* \* I know what it means when the gates are up. I understand that that is a signal for me to cross if I so desire. When they are down I understand that that is the signal for me to stay back. This day that I was struck there was no flagman upon the crossing. \* \* \* Before I crossed that crossing that day I listened for bell or whistle. I didn't hear any bell rung or whistle blown."

*Held*, that the trial court erred in directing a verdict in favor of the defendant. *HOUSE v. ERIE RAILROAD CO.*..... 559

6. — *A servant of a janitor injured by the fall of a lift—liability of the owner of the building—duty of inspection.*] The fall of a lift, constructed

**NEGLIGENCE** — *Continued.*

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less than nine months before and used in part for the removal of ashes from the upper floors of an apartment house, in consequence of the breaking of a central rope by which the car was supported, which rope, although frayed to a point in one spot, was not known to the janitor to be defective, is not, in the absence of proof that the owner of the building knew, or was chargeable with knowledge, of the condition of the rope, sufficient evidence of negligence on her part to render her liable for injuries thereby occasioned to a servant not in her employ, but in that of her janitor, while such servant was operating the lift.

The fact that ropes were placed on both sides of the lift by which it could be raised and lowered, and that one of these ropes was out of order, necessitating the servant placing herself under the car while using the other rope, and that there existed a defect in a screw bolt securing the pulley over the car at the top of the shaft, of which latter defect the owner had notice, but which, however, in no way contributed to the accident, was not considered to create any liability on the part of the owner. *SELLERS v. DEMPSEY*..... 22

7. — *An owner, employing an independent contractor, is not liable for the negligence of such contractor or of fellow-servants.*] An owner of real property who employs an independent contractor to erect a building thereon is not liable to employees of such contractor for the negligence of their master or of their fellow-servants, unless the owner either directed the negligent act to be done or took an affirmative part in its commission.

The fact that a contract made by the owner with the principal contractor provides that the owner shall have the right to inspect the materials and workmanship, modify the plans and vary the work, and that the work shall be done under the direction of the owner's architect, does not alter the owner's position as regards his liability. *BURKE v. IRELAND*... 487

8. — *Liability of an owner who furnishes an insufficient foundation.*] Where the contract of the principal contractor does not include excavation, and he has no duty in this respect except to lay no concrete in the foundation trenches until they have been examined by the architect, the duty of providing a proper foundation for the concrete, and of determining the sufficiency of such foundation, rests on the owner or his agent; if there be negligence in this particular on the part of the agent or the owner, the fact that the principal contractor was also negligent does not relieve the owner from liability.

Thus, where the foreman of the principal contractor laid out a trench and, in violation of the contract, laid concrete in it in the absence of the architect, under whose supervision the contract provided that the work was to be done, and the architect accepted and passed the concrete work without having examined the bed on which it was laid, the liability of the owner for an accident resulting from the improper character of the soil upon which the concrete was placed, is to be determined by the jury. *Id.*

9. — *Liability of an owner where an architect alters the thickness of a foundation.*] Where a contract for the erection of a building provides that it shall be performed in accordance with the plans and specifications, and executed under the direction and to the satisfaction of the owner's architect, the architect has no power to authorize the contractor to reduce the thickness of a concrete foundation from the dimensions fixed by the plans and specifications, and the owner is not liable for the architect's negligence resulting from the fact that the concrete, as diminished in thickness, is insufficient to stand the strain put upon it; the act of the architect in authorizing the reduction in thickness is not within the scope of his employment. *Id.*

10. — *Liability of an owner who has employed a competent architect.*] An owner of land who has employed a competent architect to design a building to be erected thereon, and has fairly committed the subject-matter to him, is not liable to the employees of the contractors who have agreed with the owner to construct the building according to the design, for faults or defects in it of which the owner neither knew nor should have known, provided the deficiencies or defects in the design did not proceed from his interference or direction. *Id.*

**NEGLIGENCE—Continued.**

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11. — *Owner of a building inherently defective is prima facie liable.*] Where the building as erected is inherently defective and dangerous, the owner is *prima facie* responsible for its condition, and if he desires to escape liability upon the ground that he employed a competent architect, and acted upon his advice, it is incumbent upon him to prove such facts affirmatively. *Id.*

12. — *Effect of the New York Building Law.*] *Semble*, that the Building Law, relative to the city of New York (Laws of 1892, chap. 275), prescribing the manner in which structures are to be built, does not make the owner an absolute guarantor that the building will comply with the statute. *Id.*

13. — *Right of a passenger on a street car to alight at a point made dangerous by an approaching truck.*] A passenger upon a street car who has signaled it to stop at a point at which she intends to alight, but which is at that moment rendered dangerous by the proximity of an approaching truck, is entitled to a reasonable time in which to alight and to select a safe position in the street. She is not obliged to proceed on the car to some other and safer point. If, therefore, the car is started while she is in the act of alighting and she is thrown off and injured by the truck, she cannot be held to have been guilty of contributory negligence as matter of law.

NORTON v. THIRD AVENUE R. R. Co. .... 60

14. — *Charge as to the credibility of witnesses and as to the measure of damages.*] Where, on the trial of an action brought by the passenger against the railway corporation, the judge, after instructing the jury to discriminate between witnesses not only as to intelligence, but also as to capacity, adds: "Now, Mrs. Norton (the plaintiff) appears to be a respectable lady—down to the witnesses who are the officers of the road (the defendant)," the remark cannot be construed as a statement that the plaintiff was telling the truth and the officers of the defendant were not: nor is it necessary for the court, after charging the jury that the plaintiff has a right to recover only compensatory damages, to charge that she cannot recover vindictive damages or smart money. *Id.*

15. — *Death of a passenger caused by his swaying while standing in a moving open car and striking a post near the track.*] A passenger upon an open car on an electric railroad, supplied with power from wires running on posts set between the tracks, and less than two feet distant from the floor of the car, had his hat blown off, and rose from his seat in the car to signal to the conductor, when his body swayed from the rough motion of the car, and his head came in contact with one of the poles, and he fell to the floor of the car fatally injured.

*Held*, that it was proper to submit to the jury the question whether, at the time of the accident, the car, by reason of the speed at which it was being propelled, swayed from side to side in such a manner as to endanger the safety of a passenger, occupying that part of the car nearest to the line of trolley poles, who had occasion for any purpose to assume a standing position;

That there was nothing blameworthy under the circumstances in the passenger having risen to signal the conductor.

SCHMIDT v. CONEY ISLAND & B. R. R. Co. .... 891

16. — *Expert testimony as to oscillations of cars a month after an accident.*] Testimony of a civil engineer and railroad man as to the vertical and lateral oscillation of cars on the same track a month after the accident, not accompanied by any proof that the conditions as to the load and speed were the same as at the time of the accident, is inadmissible. *Id.*

17. — *Application by the defendant to take the testimony of the attending physician of the plaintiff—the court will not anticipate a possible condition on the trial which would make it competent.*] Upon an application made by the defendant, in an action brought to recover damages for personal injuries, to take the testimony of the plaintiff's attending physician as to what took place at a consultation between him and another physician relative to the condition of the plaintiff and as to her statements in regard to the circumstances under which the injury was received, the court will not anticipate a



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condition of the evidence on the trial which will make the physician's testimony competent, especially where the plaintiff stipulates not to call as a witness on the trial the physician with whom the party sought to be examined had the consultation. **ENRIGHT v. BROOKLYN HEIGHTS R. R. Co.** ..... 538

18. — *Testimony of the plaintiff's physician as to her declarations concerning the circumstances of the accident.*] *Quere*, whether the incompetency of the attending physician to testify to the statements made by the plaintiff to him at the time that he was attending her, does not extend to statements concerning the manner in which the injury was received. *Id.*

19. — *A vehicle upset by rubbish negligently placed in a street—duty of one, driving by invitation with another, to remonstrate against his reckless driving.*] On the trial of an action brought to recover damages for personal injuries caused by the alleged negligence of the defendant in obstructing a city street by rubbish, it appeared that a vehicle, in which the plaintiff was being driven by invitation, by one Kernahan, came in contact with the rubbish and upset, injuring the plaintiff. The court charged that "if Kernahan was intoxicated or his manner of driving was so heedless or careless as that Meenagh (the plaintiff), in the exercise of ordinary care, would have perceived it and failed to do so and to remonstrate with Kernahan, he (the plaintiff) was chargeable with contributory negligence for continuing to ride with him."

*Held*, that the charge was correct. **MEENAGH v. BUCKMASTER.** ..... 451

20. — *Misuse of a municipal consent to the placing of building materials in a street.*] A consent given by a municipal corporation to the placing of building materials in a public street does not relieve the licensee from liability to one who has suffered injury from the improper manner in which the licensee has used the consent. *Id.*

21. — *Death of a bicycle rider coming out from behind an approaching car at a street railroad crossing.*] A corporation maintaining a street railway in New York city which, at a point where its line turns from Seventh avenue into Fifty-third street, stations a man between the tracks, whose duty it is to signal cars to round the curve, and another at the crosswalk to warn any one attempting to cross Fifty-third street of the approach of a car around the curve, and which also provides a flag signal at which cars approaching from the north on the avenue stop until signaled to proceed, is not liable for the death of a bicycle rider who, after riding at the rate of from six to ten miles an hour behind a car bound south on Seventh avenue, turns out to the west when the car stops at the signal north of Fifty-third street and keeps on with unabated speed until he is struck by a car rounding the curve from the south, there being no evidence that either the signalmen or the motorman could have seen him until he came in front of the south-bound car, when it was too late to avert the collision.

**CARDONNER v. METROPOLITAN STREET R. Co.** ..... 8

22. — *A child run over when stepping off a street car—verdict contrary to the weight of evidence.*] In an action brought against a street railroad corporation by a boy, who, while alighting from one of the defendant's cars, was thrown under it and injured, the testimony of the plaintiff, aged nine, supported only by that of his brother, aged eight, to the effect that the driver, after stopping the car at the request of the plaintiff, started it again as the plaintiff was alighting, throwing him under the wheel, was inconsistent with statements made by the plaintiff immediately after the accident, and again about a month later upon an examination of the driver before a police magistrate upon a criminal charge, and was contradicted by several other apparently disinterested witnesses, who asserted positively that the car did not stop, but that the plaintiff jumped off without notice to the driver while the car was in motion, and, having his back to the horses, was thrown down by its momentum.

*Held*, that a verdict in favor of the plaintiff should be set aside as contrary to the weight of evidence. **FICK v. METROPOLITAN STREET R. Co.** ..... 84

23. — *Action for personal injuries based upon the fact that the defendant suddenly started its car—the plaintiff cannot change her position on the trial.*] Where the only issue, in an action brought to recover damages for personal

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injuries resulting to the plaintiff from the alleged negligence of the defendant, an electric railroad corporation, is whether the defendant suddenly started its car after having stopped it in order to permit the plaintiff to alight, the defendant is entitled to have the court charge the jury that, if they believe that the plaintiff stepped from the car while it was in motion, their verdict must be for the defendant; as, although it is not necessarily a negligent act to alight from a moving car, the plaintiff, having taken the position that the accident occurred from the sudden starting of the car after it had stopped to enable her to alight, should not be permitted, in order to establish a liability on the part of the defendant, to shift her claim and to take another position, of which she had given the defendant no notice.

PATTERSON v. WESTCHESTER ELECTRIC R. CO. . . . . 336

24. — *A person injured by falling, at night, over a stump in a city street—when proof of similar prior accidents is competent.*] In an action brought against a municipal corporation to recover damages for injuries sustained by the plaintiff in consequence of his falling, at night, over the stump of a tree which projected seven or eight inches above the surface of the ground in a city street, the court excluded the testimony of witnesses for the plaintiff that other persons had fallen over the same stump before the accident, and in its charge instructed the jury that the plaintiff could not recover unless he established that the obstruction was one which was likely to prove dangerous, and that the defendant had constructive notice of its existence.

*Held*, that the exclusion was erroneous, as the evidence excluded bore not only upon the question of constructive notice, but also upon the character of the obstruction, as constituting a menace to the safety of pedestrians.

LUNDBECK v. CITY OF BROOKLYN. . . . . 595

25. — *Municipal corporation—action for injuries caused by its negligence—a notice of intention to sue must be actually delivered—mailing is insufficient.*] Chapter 572 of the Laws of 1886, providing that no action shall be maintained against a city for damages for personal injuries resulting from its alleged negligence unless the claimant has filed a notice of his intention to commence an action upon such claim with the corporation counsel, is complied with only by a delivery thereof by or on behalf of the claimant at the office in which it is to be filed; service of such a notice by mail is insufficient. BURFORD v. THE MAYOR . . . . . 225

26. — *What proof of service of notice is insufficient.*] The testimony of a witness, sworn upon the trial of an action brought against a municipal corporation to recover damages for personal injuries, that he saw in the office of the corporation counsel, in the hands of an assistant, a notice of the claim with the name of the corporation counsel written upon it, does not establish proper service thereof. *Id.*

27. — *Selection by an employee of an unfit but not structurally defective machine—acceptance of an obvious risk.*] The selection by an experienced employee, from among several traveling cranes, of one not shown to have been improperly constructed, which, to the knowledge of the employee, had rust and dirt in its parts, and was not oiled, constitutes a clear assumption on his part of an obvious risk. PARENTO v. TAYLOR & COMPANY. . . . . 518

28. — *Res ipsa loquitur.*] Where the hand chain attached to a traveling crane fails to work, and the employee engaged in operating it pulls upon the lowering part of the hand chain, whereupon the load comes down suddenly, drawing his hand in between the chain and wheel and injuring it, no presumption arises from the manner in which the accident occurred that it was necessarily caused by the stretching of a link in the chain; the doctrine of *res ipsa loquitur* does not apply to such a case. *Id.*

29. — *Employers liable for a defect in a derrick erected as a permanent structure.*] In an action charging employers with negligence it appeared that the plaintiff, an employee, was injured because an eyebolt, fastened in the stringpiece of a dock, to which were attached two wire ropes, used respectively to support each of two permanent derricks standing on the dock, broke, as there was evidence tending to show, both because of the insufficiency of the eyebolt and because of the improper method in which it was

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fastened into the stringpiece, by reason of which one derrick fell, throwing the plaintiff from his position on the top of it, while a load was being lifted on the other derrick, and injuring him.

*Held*, that, the derrick having been erected as a permanent structure, the employers were liable. **DOUGHERTY v. MILLIKEN**..... 386

30. — *A boy of eight killed by running into a cable car in the middle of a block — contributory negligence.*] A corporation maintaining a line of cable cars on an avenue running north and south in New York city, is not liable for the death of a boy eight years of age who, while running diagonally across the avenue at the middle of a block, toward the east side thereof, without stopping to look or listen, was struck and killed just as he stepped upon the westerly rail of the east track by a car going north which, when he started to cross the street, was in plain sight proceeding slowly behind a covered wagon, but the speed of which the gripman had suddenly accelerated after the wagon had left the track and while the gripman was looking to the east and continuing an altercation he had been holding with the driver of the wagon. **COSTELLO v. THIRD AVENUE R. R. Co.**..... 48

31. — *Next of kin, for whom an executor may sue.*] In an action given by section 1902 of the Code of Civil Procedure to an executor or administrator, in his representative capacity, to recover damages for a wrongful act, neglect or default occasioning the death of his decedent, it was considered that the question who was the next of kin should be determined as of the time of the death. **MUNDT v. GLOKNER**..... 123

32. — *Effect of the death of the next of kin before the trial.*] Effect on the amount of damages, of the death before the trial of the action of one originally entitled to the recovery, considered. *Id.*

33. — *Leave to appeal to the Court of Appeals.*] Leave to appeal to the Court of Appeals given in such a case. *Id.*

34. — *What is a reasonable opportunity to leave a train is a question for the jury.*] In an action brought by a passenger on one of the defendant's trains, who, waking up at a terminal station after the other passengers had left the car and had proceeded some 80 or 100 feet from it, attempted to alight while the train was standing still, and was thrown down and injured in consequence of the train being suddenly backed, the question whether the defendant was, under the circumstances, negligent in too precipitately backing the train, should be submitted to the jury. **DALY v. CENTRAL R. R. Co.**.... 200

35. — *Injury to a stevedore from catching his hand in the rope of a steam winch.*] Injuries sustained by a stevedore, of several years experience in his occupation, from catching his hand in the sling or rope of a steam winch so that his hand was drawn into the pulley at the end of the crane and was crushed, considered by the court, under the evidence, not to have been caused through any neglect of his employer, but by the carelessness of a fellow-servant or by his own negligence.

**GARVEY v. N. Y. & CUBA STEAMSHIP CO.**..... 456

36. — *An owner of a building is not liable for the negligence of independent contractors, employed to take it down, to their employee.*] The owner of an old building, who has contracted with independent contractors for its demolition, is not liable in damages for the death of an employee of the contractors who is killed by the collapse of the building caused by the overweighting of one of its floors with brick through the negligence of the contractors or of their servants. **CULLOM v. MCKELVEY**..... 46

**NEGOTIABLE PAPER** — *Law relating to.*

*See* **BILLS AND NOTES.**

**NEW YORK CITY** — *Bills of an attorney designated to act in a proceeding to take property for the board of education — the taxation thereof by a justice of the Supreme Court is a judicial act — mandamus.*] The action of a justice of the Supreme Court in taxing, under section 2 of chapter 393 of the **Laws** of 1896, the bills of an attorney, designated by the corporation counsel of the city of New York, pursuant to section 1 of that act, to appear for the city of New York in proceedings for the taking of property for the purposes of its

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board of education, is judicial, and his conclusion thereon cannot be questioned collaterally by the board of education, which may be compelled by mandamus to make the requisition on the Comptroller required by chapter 728 of the Laws of 1896 for the payment of a bill so taxed.

PEOPLE EX REL. ALLISON v. Bd. of Education..... 208

— *Sheriff of New York — liability of his executrix and sureties for fees not paid over under chapter 523 of 1890 — constitutionality of that act — estoppel to deny its validity — form of a bond under the statute — the city may sue upon it — plea of plene administravit — right of a claimant to put his claim in judgment.*

See MAYOR v. GORMAN..... 191

— *Moneys paid into court by New York city in condemnation proceedings — they are subject to the control of the court, and it may change the custodian to the end that the life tenant may receive a higher rate of interest — notice of the proposed change must be given to the remaindermen.*

See MATTER OF NEWTON ..... 547

— *Purchase of supplies — when a supply is "needful for any particular purpose" and the contract exceeds \$1,000, it must be awarded upon bids submitted after public notice — several orders each less than, but together exceeding, \$1,000 are within the statute.*

See WALTON v. THE MAYOR..... 76

— *Rapid Transit Act — right of the court to impose conditions upon confirming the report of its commissioners — conditions of the bond required.*

See MATTER OF RAPID TRANSIT R. R. COMRS..... 608

**NEW YORK COUNTY —** *Place of trial — it will not be changed from Queens county to New York county for the convenience of witnesses.*

See NAVRATIL v. BOHM..... 460

**NOTICE —** *Bona fide transferee of negotiable paper.* 1. The receipt by brokers of a check drawn on a bank by a customer "as trustee" and deposited with the brokers in an account with this customer "as trustee," and proof that a subterfuge to withdraw the money from the category of trust funds was resorted to by a repayment of the money by a check drawn by the brokers to the trustee, who immediately deposited the proceeds of such check with the brokers, were considered to be sufficient evidence of notice on their part of the trust character of the money. MARSHALL v. DE CORDOVA..... 615

2. — *Mandamus — to review the action of a club in expelling a member.* When a member of a club is entitled on the trial of the issues in mandamus proceedings to have submitted to the jury the question whether he had been given reasonable notice to defend himself upon the charge upon which he was expelled, i. e., of making a willful or reckless misstatement in a circular, considered. PEOPLE EX REL. WARD v. UPTOWN ASSN. .... 297

— *Moneys paid into court by New York city in condemnation proceedings — they are subject to the control of the court, and it may change the custodian to the end that the life tenant may receive a higher rate of interest — notice of the proposed change must be given to the remaindermen.*

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— *Fire insurance policy — notice of its cancellation by the insurer — an offer in the notice to return the unearned premium on surrender of the policy is sufficient, without an actual tender thereof.*

See BACKUS v. EXCHANGE FIRE INS. CO..... 91

— *Municipal corporation — action for injuries caused by its negligence — a notice of intention to sue must be actually delivered — mailing is insufficient.*

See BURFORD v. THE MAYOR..... 225

**OFFICER —** *Salaried health officer — when not entitled to charge for services rendered to smallpox patients.*

See REYNOLDS v. CITY OF MOUNT VERNON ..... 581

See SHERIFF.

**OFFSET :**

See SET-OFF.

**OPINION** -- *When admissible as evidence.**See* WITNESS.**ORAL AGREEMENT:***See* CONTRACT.**ORDER:***See* MOTION AND ORDER.

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**PARTITION** — *The Special Term cannot alter the conclusions of a referee appointed to hear and determine an action of partition.] Semble, that where the issues in an action of partition have been referred to a referee to hear and determine, and he has made an interlocutory report fixing the respective shares of the property to be partitioned, to which each of the parties is entitled, and directing a certain judgment to be entered, the direction of the court as to the entry of judgment (required in the first department) must conform to that contained in the referee's report, and the Special Term has no power to modify such direction of the referee.* *PAGET v. MELCHER* ..... 12

— *A reply in a partition suit which raises an issue as to who were the heirs of the person who died seized of the premises, is not frivolous.*

*See* HENRIQUES v. GARSON. (No. 4)..... 38

**PARTNERSHIP** — *Evidence to establish a partnership — declarations made in the absence of the alleged partner — a witness' understanding as to the person referred to is incompetent.] 1. Declarations of a husband, made in the absence of his wife, tending to show that they were partners, are not competent, as against the wife, to establish that relation; nor can a witness be permitted to testify that he understood that the husband, in making such declarations, used the word "we" as including his wife.*

*LAWRENCE v. THOMPSON* ..... 30

2. — *Testimony as to the value of the good will of a partnership.] The opinion of an expert as to the value of the good will of a partnership is not competent as evidence.* *KIRKMAN v. KIRKMAN*..... 395

3. — *Insufficient proof of partnership.] What proof is insufficient to establish the existence of a partnership between a mother and her son, considered.* *SWEETSER v. DAVIS*..... 398

— *Agreement by a wife to pay her husband one-half of the profits on a purchase and sale of real estate — proof required and consideration necessary to sustain it.*

*See* GOUGE v. GOUGE..... 154

**PASSENGER** — *On a railroad.**See* RAILROAD.

**PAYMENT** — *When a mortgagor making a payment to the attorney of the owner of the mortgage is not protected in so doing — scrivener rule.] 1. Where an attorney, who did not make the investment originally, and who has no direct authority to receive payment of the principal of a bond and mortgage, has received, by authority of the assignee thereof, one payment of interest, and has obtained, in some undisclosed manner, the physical possession of the bond and mortgage, but not of the assignment thereof, he has not such apparent authority to receive payment of the principal of such bond and mortgage as will protect the mortgagor in making a payment of the principal sum secured thereby to him. To justify such an inference of authority on the part of the attorney, he must have had the control of the investment from the beginning to the end.* *CENTRAL TRUST CO. v. FOLSOM* ..... 40

2. — *A payment on a recorded mortgage to one who negotiated the loan, but is not shown to have had possession of the securities, is not protected.] An illiterate foreigner, unable to speak the English language, who has made payments upon a bond and a recorded mortgage, which was a lien upon her premises, to an attorney who negotiated the loan, but is not shown to have been in possession of the securities at the time when such payments were made, and who gave her receipts whose form indicated that he was acting merely as attorney for the mortgagees, is not protected in making such payments, and the bond and mortgage may be enforced against her premises for the amount actually due and unpaid to the mortgagees.* *FRANK v. TUOZZO*..... 447

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- *Moneys paid into court by New York city in condemnation proceedings — they are subject to the control of the court, and it may change the custodian to the end that the life tenant may receive a higher rate of interest — notice of the proposed change must be given to the remaindermen.*  
*See* **MATTER OF NEWTON.** ..... 547
- *Payment of a draft—liability of a bank in collecting a draft for a customer — effect of the acceptance, by its agent, of the drawee's draft upon a third person.*  
*See* **KIRKHAM v. BANK OF AMERICA.** ..... 110
- *Accord and satisfaction — the use by a creditor of a check of his debtor after protesting that it was too small in amount.*  
*See* **ROTHSCHILD v. MOSBACHER.** ..... 167
- *The consideration necessary to sustain an agreement to extend the time of payment of an obligation, considered.*  
*See* **TOPLITZ v. BAUER.** ..... 125
- *Counterclaim — when it states, with sufficient certainty, the purpose of a payment.*  
*See* **KELLY v. ERNEST.** ..... 90
- *Breach of contract — failure to pay as agreed — excuse must be shown therefor.*  
*See* **DEVOY v. NEW YORK CUT FLOWER CO.** ..... 539

**PENAL CODE** — §§ 615, 616 — *The act limiting the sale of passage tickets to common carriers and their authorized agents is constitutional.*

- See* **PEOPLE EX REL. TYROLER v. WARDEN.** ..... 228
- § 688 — *A crime charged as a second offense — proof, on the trial, of the former offense although the prisoner admits it — it is not violative of the Constitution.*  
*See* **PEOPLE v. SICKLES.** ..... 470

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**PERFORMANCE** — *Of contracts.*

*See* **CONTRACT.**

**PERJURY** — *Subornation of perjury — proof of acts and declarations of conspirators, out of each other's presence, is admissible — proof of attempts to induce others to swear falsely — cross-examination as to collateral matters.*

*See* **PEOPLE v. VAN TASSEL.** ..... 445

**PERSONAL PROPERTY** — *Replevin — an undertaking to reclaim property — it need not be described as being the same property described in the plaintiff's affidavit — what is notice that the defendants will contest the identity of the property.*

*See* **ROUSE v. HAAS.** ..... 171

— *Will — a declaration, that personal property shall "belong" to children, conveys a reversionary remainder — how far a subsequent gift over by way of substitution modifies it.*

*See* **PAGET v. MELCHER.** ..... 12

— *Execution — levy upon property of which the judgment debtor is a tenant in common — remedy of the co-tenant where the sheriff sells the entire property.*

*See* **HENDERSON v. BRENNER.** ..... 309

— *Replevin — demand necessary in case of a chattel sold conditionally — when the removal of the chattel by the vendee is not a conversion.*

*See* **MORAN v. ABBOTT.** ..... 570

— *Bailment — delivery to the husband of the bailor — liability therefor.*

*See* **MARKOE v. TIFFANY & CO.** ..... 95

— *Sales of.*

*See* **SALE.**

**PHYSICIAN** — *Salaried health officer — when not entitled to charge for services rendered to smallpox patients.*

*See* **REYNOLDS v. CITY OF MOUNT VERNON.** ..... 581

— *Competency of his testimony in an accident case.*

*See* **ENRIGHT & BROOKLYN HEIGHTS R. R. CO.** ..... 588

**PLACE OF TRIAL:***See* VENUE.

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**PLEADING**—*Application for an order of arrest for fraud—the facts constituting the fraud must be stated.*] 1. Upon an application by the plaintiff, in an action to recover for goods sold, for an order of arrest under section 549 of the Code of Civil Procedure, upon the ground that the defendant was guilty of fraud in making the purchase, the facts constituting the alleged fraud must be stated; a complaint is not sufficient which alleges, "on information and belief, that the defendant herein was guilty of a fraud in the purchase of said goods, and in contracting or incurring said liability, and that he has, since the making of the contract, removed and disposed of his property with intent to defraud his creditors."

*Seemle*, that it requires as good a case on the pleadings to obtain an order of arrest upon the ground of fraud as would be required to justify a vendor in rescinding the contract.

HARRISBURG PIPE BENDING CO. *v.* WELSH ..... 515

2. — *An answer denying material allegations upon information and belief cannot be overruled as frivolous.*] In an action brought by a judgment creditor of a corporation to recover of a stockholder thereof a certain sum because of his unpaid subscription, an answer denying upon information and belief allegations of the complaint as to the time when the corporation was organized, the amount of its stock, the amount actually subscribed for and the amount actually paid in, and as to the defendant's failure to pay his subscription to the stock, puts in issue material allegations of the complaint, and cannot be overruled as frivolous, however improbable it may appear to the court that the defendant is not aware of the exact facts.

TRUMBULL *v.* ASILEY ..... 356

3. — *Irrelevant allegations in a reply—stricken out.*] Allegations in a reply, to the effect that the executor of a will, under which a defendant claimed title to premises sought to be partitioned in the action, was a mere agent and servant of another defendant, and that his purpose in bringing an action to establish the will, which was set forth in the answer, was to prevent the trial of the partition suit on the merits, and a denial that the judgment in the action to establish the will had any valid force or effect upon the right of the plaintiffs in respect to the property mentioned in the complaint, are properly stricken out as irrelevant. HENRIQUES *v.* GARSON. (No. 3). .... 35

4. — *Bill of particulars, applied for on the ground that it is necessary to enable the defendant to answer—it cannot be granted upon the ground that it is necessary to enable the defendant to prepare for trial.*] Where, pending the decision of a motion, made by the defendant in an action, for a bill of particulars of the matters alleged in the complaint, upon the ground that it is necessary to enable the defendant to answer, the answer is served (an application for an extension of time to answer having been refused), the court has no power to order the plaintiff to serve a bill of particulars upon the ground that it is necessary to enable the defendant to prepare for trial.

MCCLELLAN *v.* DUNCOMBE. .... 353

5. — *Action against a director for a failure to file an annual report—leave to serve an amended answer—merits of the proposed answer not considered.*] Upon an application made by a director of a corporation for leave to serve an amended answer, setting up the Statute of Limitations as a defense to an action brought against him because of the failure of the corporation to file an annual report, the court will not pass upon the merits of the proposed defense. GERDAU *v.* FABER. .... 606

6. — *Laches in making the application.*] Where it appears that the board of directors has attempted to comply with the statute, the action being penal in its nature, the court will not be strenuous to deny the application upon the ground of laches. *Id.*

7. — *A reply in a partition suit which raises an issue as to who were the heirs of the person who died seized of the premises, is not frivolous.*] Where a reply to an answer, interposed in an action of partition brought by alleged heirs at law of a person who died seized of the premises, raises a question, which cannot be decided upon a mere inspection of the pleadings, as to

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who were the heirs at law of such decedent, judgment should not be granted thereon, as frivolous. <i>HENRIQUES v. GARSON</i> . (No. 4).....	38
8. — <i>Contract—sufficiency of a complaint for its enforcement.</i> ] In an action to enforce an agreement by which the defendant agreed to pay a certain sum to the plaintiff on condition that the plaintiff should first furnish a certain release, a complaint which alleges that, after the time for the payment of the money had arrived, the plaintiff tendered the release and demanded payment, but that this was refused, and that the plaintiff now is and always has been ready to deliver the release upon receiving the payment, states a cause of action. <i>KELLY v. BAKER</i> .....	217
9. — <i>Each count must be complete in itself.</i> ] A defense which is separately pleaded as a distinct defense must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or that part thereof which it purports to answer. <i>SBARBORO v. HEALTH DEPARTMENT</i> . 177	177
10. — <i>A separate defense cannot be aided by resorting to parts of the answer not referred to.</i> ] A separate and distinct defense cannot be aided by resorting to other parts of the answer to which it does not refer either in terms or by necessary implication. <i>Id.</i>	
11. — <i>Interpleader—granted only where the defendant admits a liability for the full amount.</i> ] An order of interpleader will only be granted where the defendant admits a liability to some one for the full amount claimed, and the only question is to whom he owes it. <i>BERNSTEIN v. HAMILTON</i> ... 206	206
12. — <i>Injunction, dependent upon the cause of action—the right thereto must appear in the complaint.</i> ] Where the right to an injunction depends upon the nature of the action (Code Civ. Proc. § 603), the complaint must be presented upon the application therefor, and no facts can be considered except such as are set forth in the complaint. <i>SANDERS v. ADER</i> ..... 176	176
13. — <i>How the sufficiency of facts should be raised.</i> ] The sufficiency of facts, pleaded as a defense, should be raised by demurrer or upon the trial, and not by a motion to strike out the defense. <i>KELLY v. ERNEST</i> ..... 90	90
— <i>Action in equity to set aside transfers of a life insurance policy—on a failure to establish an equitable cause of action, a money judgment at law is improper—a defendant cannot by answer interject into the equitable action a new legal cause of action for conversion available only against co-defendants and enable the plaintiffs to recover judgment thereon.</i>	
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2. — *Authority of an agent to execute a lease for more than a year—it must be in writing.*] A lease under seal for more than a year executed by agents, not authorized in writing by the lessor to execute it on his behalf, is void under the Real Property Law (Laws of 1896, chap. 547, § 224), and is not entitled to be recorded. *GRIFFIN v. BAUST*..... 553

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*Held*, that, as the passenger was in the station and had already encountered the danger of crossing the tracks when ejected, his ejection simply exposed him again to this danger, and was, therefore, not a protective but a punitive act on the part of the station officer, who, in doing it, exceeded his powers and those of the railroad company;

That it was no defense to the railroad company, which was bound to furnish a station to its passengers, that the station in question was a union station under the management of another corporation.

PENFIELD *v.* CLEVELAND, C., C. & ST. L. R. R. Co..... 413

2. — *Limitations of the power to borrow money.]* The provisions of the Stock Corporation Law (Laws of 1892, chap. 688, § 2), relative to the power of a corporation to borrow money and mortgage its property, apply to a railroad corporation and limit the amount of a mortgage, which it may legally give, to the amount of its capital stock or to two-thirds of the value of its corporate property, if that be greater than its capital stock.

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3. — *Execution of a mortgage to secure bonds.]* The legality of a mortgage, not limited in its amount either to the capital stock or to two-thirds of the value of the corporate property, given to secure bonds to be used in taking up outstanding issues, and also to secure further bonds, which are only to be issued with the consent of the stockholders, considered. *Id.*

4. — *A street railroad company—it has a paramount right to that part of a street in which its rails are laid, between intersecting streets.]* The cars of a street railroad corporation have a paramount right to the use of that portion of the street occupied by their tracks which lies between intersecting streets. ROSENBLATT *v.* BROOKLYN HEIGHTS R. R. Co..... 600

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**RAPID TRANSIT ACT**—*Right of the court to impose conditions upon confirming the report of its commissioners.*] 1. In view of the fact that the Appellate Division has an absolute right to refuse to confirm the report of the Supreme Court rapid transit commissioners of the city of New York, it has power to confirm such a report subject to certain conditions imposed by it as to the security to be required of the contractor for the protection of the city. MATTER OF RAPID TRANSIT R. R. COMRS. .... 608

2. — *Conditions of the bond required.*] The former determination of the Appellate Division, that the contractor be required to give the city a bond for \$15,000,000, it was considered should be reaffirmed as to the amount, but that \$14,000,000 of the bond should be conditioned upon construction and equipment, and that \$1,000,000 should be a continuing security applicable to construction, equipment, rents, maintenance and operation. *Id.*

**REAL PROPERTY**—*Marketable title—encroachment of a building on another lot—effect of a subsequent ownership of both lots by the same person—notice of the appointment of a new trustee of a mortgage.*] 1. One Bird, a member and one of the trustees of a Masonic lodge, was employed by it as superintendent and architect to erect a building on a lot belonging to the lodge on which the lodge had previously executed a mortgage to a trustee to secure certain bonds, and while so acting Bird established the south line of said building, he himself being the owner of the lot which abutted upon the lodge lot on the south. A question having arisen as to whether the building encroached upon Bird's lot, he conveyed to the lodge a strip of land southerly of and adjoining the building, one foot wide. Thereafter the lodge conveyed to Bird the entire premises, including the one foot conveyed to it by Bird, and subsequently Bird conveyed the same premises to one Baust, subject to the payment of the bonds and mortgage which Baust assumed.

*Held*, that Bird and those who claimed under him were estopped from subsequently alleging that the wall encroached on the adjoining lot, as the encroachment ceased at the moment when he became the owner of both lots, and any conveyance of the adjoining lot subsequently made by him would be chargeable with the servitude of the encroaching wall;

That the Supreme Court had power on the death of the trustee of the mortgage to appoint a successor, and that the fact that the holder or holders (who were unknown) of one twenty-first part of the bonds had not joined in or ratified such appointment, did not deprive the court of jurisdiction to make it;

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That a title acquired at a sale of the premises under a foreclosure of such mortgage, at which sufficient money had been realized to pay all the bonds, was not affected by the fact that the substituted trustee had been so appointed.

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2. — *Oral agreement by a vendee, in consideration of a deed of land, to discharge mortgages on other land of the vendor — Statute of Frauds.* An oral agreement, made by the vendee of premises, that as part of the purchase price she will pay off and discharge mortgages upon other property owned by the vendor, is not void under the Statute of Frauds.

PURDY v. COLLYER. . . . . 338

3. — *When an action is for specific performance and not to remove a cloud on title — Statute of Limitations.* An action by the vendor to compel the vendee, who, instead of satisfying the mortgages, has taken assignments of them to herself, to satisfy the mortgages or to reconvey to the vendor the premises conveyed to her by him, is not an action to remove a cloud upon title, against which the Statute of Limitations never runs, but is an action for the specific performance of the agreement, and, as such, is governed by the ten years' Statute of Limitations. *Id.*

4. — *The plaintiff in an action to determine claims to real estate must show possession.* Where the complaint in such an action expressly alleges that the fee of the premises upon which the mortgages were a lien has been acquired by the city of New York, the action cannot be sustained as one for the determination of conflicting claims to real property, as the plaintiff does not show possession in himself as required by sections 1638 and 1639 of the Code of Civil Procedure. *Id.*

— *Mechanic's lien — the time to file a lien is not extended by slight repairs ordered and made four months after the completion of the original contract — repairs ordered by a tenant who is to be made an allowance for them out of the rent — they are made with the consent of the owner.*

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— *Specific performance — where a father, a tenant by the curtesy and guardian in socage, acquires real estate left by his deceased wife, by means of a mortgage foreclosure occasioned by his default in payment of interest, his title is marketable.*

See KULLMAN v. COX. . . . . 158

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*See* APPEAL.

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**REFERENCE** — *When a long account is not involved.*] 1. Where a complaint states four causes of action, one to recover a definite sum alleged to be due upon a contract made by the plaintiff with the defendant, and the others to recover damages resulting from the defendant's alleged breach of the contract, the fact that the items which go to make up the alleged damages occasioned by the breach are numerous does not make the action one upon an account and, therefore, referable; and the defendant, who by his answer presents the general issue as to all the causes of action, is entitled to a trial by jury. ALLENTOWN ROLLING MILLS *v.* DWYER..... 101

2. — *Review of a denial of a motion to refer.*] It is only in a very exceptional case that the Appellate Division will review the discretion of the court below in refusing to refer the issues in a common-law action. *Id.*

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**REPLEVIN** — *Demand necessary in case of a chattel sold conditionally.*]

1. The demand, which is a necessary condition to the maintenance of an action of replevin against a vendee who is in lawful possession of a chattel under a conditional contract for its sale, is not established by proof of a mere demand for the money due; it must be accompanied by a demand, in the alternative, for the chattel itself. *MORAN v. ABBOTT*..... 570

2. — *Presumption that a mailed letter was received — a denial of its receipt by a party in interest presents a question for the jury.*] Where, in such an action, proof is made that the attorney for the vendor duly mailed a sufficient demand to the vendee at her proper address, her denial of its receipt does not overcome the presumption that she received the letter — she being a party in interest, her denial merely raises a question of fact for decision by the jury. *Id.*

3. — *When the removal of a chattel by the vendee is not a conversion.*] When the removal of the chattel from the house of the vendee cannot be treated as a conversion as a matter of law and thus render a demand unnecessary, considered. *Id.*

4. — *An undertaking to reclaim property — it need not be described as being the same property described in the plaintiff's affidavit — what is notice that the defendants will contest the identity of the property.*] An undertaking given by the defendants upon a demand for the return of property seized by the sheriff in an action of replevin need not, in order to comply with section 1704 of the Code of Civil Procedure, necessarily recite that the property thus sought to be returned is that mentioned in the affidavit of the plaintiff; where it does not contain that recital such omission on the part of the defendants constitutes notice to the plaintiff that the defendants propose to litigate, not only the title, but also the identity, of the property taken by the sheriff, as they have a legal right to do. *ROUSE v. HAAS*..... 171

5. — *Requisition set aside where the affidavit insufficiently describes the property sought to be replevied.*] An affidavit, upon which a requisition in replevin is issued to a sheriff, which gives no description of the property sought to be replevied beyond certain references to some pieces and numbers of yards and other unintelligible numbers, is clearly defective under section 1695 of the Code of Civil Procedure and the requisition should be set aside. *SCHWIETERING v. ROTHSCHILD*..... 614

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*See* KINNAN v. SULLIVAN COUNTY CLUB..... 213
- 1890, chap. 568, § 15 — *Brooklyn* — its park commissioner has no power to maintain an action to prevent the maintenance of a steam railroad on Fort Hamilton parkway.  
*See* PEOPLE EX REL. COCHEU v. DETTMER..... 327
- 1892, chap. 182, §§ 220, 221 — *Salaried health officer* — when not entitled to charge for services rendered to smallpox patients.  
*See* REYNOLDS v. CITY OF MOUNT VERNON..... 581

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- 1892, chap. 275 — *The Building Law, relative to the city of New York, prescribing the manner in which structures are to be built — it does not make the owner an absolute guarantor that the building will comply with the statute.*  
*See BURKE v. IRELAND.*..... 487
- 1892, chap. 301 — *Action by a taxpayer to prevent waste — injunction to restrain an electric company from unlawfully excavating in a public park, in order to set poles — failure to allege that city officials intend to do an unlawful act.*  
*See SHEEHY v. McMILLAN.*..... 140
- 1892, chap. 665 — *Brooklyn — its park commissioner has no power to maintain an action to prevent the maintenance of a steam railroad on Fort Hamilton parkway.*  
*See PEOPLE EX REL. COCHEU v. DETTMER.*..... 827
- 1892, chap. 688, § 2 — *Railroad corporations — execution of a mortgage to secure bonds — limitations of the power to borrow money.*  
*See FLYNN v. CONEY ISLAND & B. R. R. Co.*..... 416
- 1892, chap. 690, §§ 41, 43, 118 — *Mutual insurance companies — under what provision of the Insurance Law their right to continue business is to be determined by the superintendent — examiners' report.*  
*See PEOPLE EX REL. LONG ISLAND MUTUAL v. PAYN.*..... 584
- 1895, chap. 559 — *Expulsion of a member from a club — notice that a charge will be considered at a hearing before the board of directors — the proof may be made as broad as the notice — mandamus.*  
*See PEOPLE EX REL. WARD v. UPTOWN ASSN.*..... 297
- 1895, chap. 673 — *Mechanics' liens — when an ice-making plant may be made the subject of a lien.*  
*See NASON ICE MACHINE Co. v. UPHAM.*..... 420
- 1896, chap. 112, § 34 — *Liquor Tax Law — an offender against its provisions cannot be sentenced to an imprisonment of one day for each dollar of the fine unpaid — discharge under a writ of habeas corpus.*  
*See PEOPLE v. STOCK.*..... 564
- 1896, chap. 393 — *New York city — bills of an attorney designated to act in a proceeding to take property for the board of education — the taxation thereof by a justice of the Supreme Court is a judicial act — mandamus.*  
*See PEOPLE EX REL. ALLISON v. Bd. of EDUCATION.*..... 208
- 1896, chap. 547, § 224 — *Authority of an agent to execute a lease for more than a year — it must be in writing.*  
*See GRIFFIN v. BAUST.*..... 558
- 1896, chap. 547, § 225 — *Deed by an executor under a power of sale of land held adversely.*  
*See BULLARD v. BICKNELL.*..... 319
- 1896, chap. 728 — *New York city — bills of an attorney designated to act in a proceeding to take property for the board of education — the taxation thereof by a justice of the Supreme Court is a judicial act — mandamus.*  
*See PEOPLE EX REL. ALLISON v. Bd. of EDUCATION.*..... 208
- 1896, chap. 908, § 2, subd. 4 — *Assessment for taxation — an award, made in condemnation proceedings, under chapter 490 of 1883, refused by owners as inadequate and deposited in a trust company to their credit — assessors may, under subd. 4 of § 2 of chap. 908 of 1896, assess the owners upon the money so deposited.*  
*See PEOPLE EX REL. LYON v. HALSTED.*..... 316
- 1896, chap. 908, §§ 12, 31 — *Taxation of a corporation — a deduction of ten per cent of its capital stock depends on its surplus equalling that sum — failure to prove the source of a surplus.*  
*See PEOPLE EX REL. CITIZENS' ILLUM. Co. v. NEFF.*..... 542
- 1897, chap. 506 — *The act limiting the sale of passage tickets to common carriers and their authorized agents is constitutional.*  
*See PEOPLE EX REL. TYROLER v. WARDEN.*..... 238

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**SET-OFF** — *When a counterclaim states, with sufficient certainty, the purpose of a payment.*] In an action upon an account stated, in which the defendant interposes a general denial to the complaint, and also alleges, by way of counterclaim, that after he had made a contract with the plaintiff for the performance of certain work for a fixed sum, he paid the plaintiff a certain sum, in addition to that of which the plaintiff admitted the receipt, to induce him to perform the work which he subsequently failed to perform, to the damage of the defendant, the answer sufficiently states the purpose of the payment and its voluntary character, and an order requiring the defendant to make his answer more definite and certain by stating whether the alleged payment was made on account of the work done under the contract or for what other purpose, is improperly granted. *KELLY v. ERNEST*... 90

— *Attachment — contract liability on the undertaking — counterclaim against the defendant in the attachment suit enforced against an assignee of the undertaking — it must exist before notice of an assignment of the undertaking.*

See *BIEN v. FREUND*..... 203

— *Action for false representations — a defendant admitting the fraud cannot interpose a counterclaim.*

See *HAUPT v. AMES*..... 550

**SHERIFF** — *Of New York — liability of his executrix and sureties for fees not paid over under chapter 523 of 1890 — constitutionality of that act.*] 1. Chapter 523 of the Laws of 1890, entitled "An act in relation to the office of sheriff of the city and county of New York," providing for the compensation, by salaries and fees, of the sheriff and of his subordinates, fairly embraces within its subject and title all matters legitimately and naturally connected with the administration of that office in its entirety, and the powers, duties and emoluments of its administrators, and, hence, is not a violation of section 16 of article 3 of the then existing Constitution of 1846, as being a local bill embracing more than one subject, or embracing subjects not expressed in its title; nor does it, in providing for the compensation of the sheriff and his subordinates, appropriate, in the sense of the Constitution, "the public moneys or property for local or private purposes;" nor does it create a tax. *MAYOR v. GORMAN*..... 191

2. — *Estoppel to deny the validity of chapter 523 of 1890.*] The executrix of a sheriff who went into office, received his statutory salary, paid over a part of the fees received by him to the comptroller of the city of New York, and received back one-half of such fees, under chapter 523 of the Laws of 1890, is estopped from claiming, in defense of an action brought by the mayor, aldermen and commonalty of the city of New York to recover a balance of moneys still due the city from him under that act, that it is unconstitutional; nor can she interpose a counterclaim for all the moneys which her testator had thus paid to the city.

In this respect the sheriff, the sureties upon his official bond and the legal representatives of each of them are similarly situated. *Id.*

3. — *Form of a bond under chapter 523 of 1890 — the city may sue upon it.*] An official bond given by a sheriff, who took office on the day when the act (Chap. 523 of the Laws of 1890) went into effect, was considered to have been properly drawn under that act and not under the statutes as they existed before its passage; and although in form running to the People of the county of New York, it was held that it might, without any leave being first obtained to sue thereon, be, in a proper case, sued upon by the mayor, aldermen and commonalty of the city of New York to recover fees which the sheriff had failed to pay over. *Id.*

4. — *Plea of plene administravit — right of a claimant to put his claim in judgment.*] In such an action it is not a defense to the executors of a surety that, although they duly advertised for claims against their testator, the claim in question was not presented "within six months" after the first publication of the notice authorized by section 2718 of the Code of Civil Procedure, and that they have paid out all the assets of the estate which have come into their hands; the statute merely relieves them from any liability for assets which they, after the time for publication had expired, have legally distributed; it does not prevent a claimant against the estate from liquidating his claim by putting the same in judgment. *Id.*

**SHERIFF**— *Continued.*

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5. — *Action against a sheriff—executors of his indemnitors cannot be substituted in his stead—the statute construed in analogy to the common law.*] The provisions of section 1421 of the Code of Civil Procedure, permitting the court, upon the application of the sheriff, to grant an order substituting his indemnitors in his place as defendants in an action brought against him, do not justify the substitution of executors of the estates of deceased indemnitors—the statute, being in derogation of the common law, should, when susceptible of two interpretations, be construed when practicable in conformity with it.

In any event the procedure to collect a judgment from an estate being very different from that obtaining in the collection of judgments against individuals, the substitution of the executors of deceased indemnitors in place of the sheriff in such a case would be an improper exercise of power by the court. *BUCHNER & CO. v. TAMSEN*..... 612

— *Execution—levy upon property of which the judgment debtor is a tenant in common—remedy of the co-tenant where the sheriff sells the entire property.*  
See *HENDERSON v. BRENNER*..... 309

**SHIPPING**— *Negligence—injury to a stevedore from catching his hand in the rope of a steam winch.*  
See *GARVEY v. N. Y. & CUBA STEAMSHIP CO.*..... 456

**SIDEWALK**— *In a city.*  
See *MUNICIPAL CORPORATION.*

**SOCIETY** :  
See *ASSOCIATION.*

**SPECIFIC PERFORMANCE**— *Where a father, a tenant by the curtesy and guardian in socage acquires real estate left by his deceased wife, by means of a mortgage foreclosure occasioned by his default in payment of interest, his title is marketable.*] 1. A father, who was guardian in socage of his infant children and tenant by the curtesy of premises formerly owned by their deceased mother, subject to a mortgage which was by its terms to become due, at the option of the mortgagee, upon a default of thirty days in the payment of interest, suffered the premises to be sold in foreclosure upon a default in the payment of six months' interest for thirty days, and soon thereafter took a deed of them from the mortgagee, by whom they were purchased at such sale, for the same consideration as that paid at the foreclosure sale, giving in payment a larger mortgage than that foreclosed.

In an action subsequently brought by the father to compel specific performance of a contract made by him for the sale of such premises,  
*Held*, that, in the absence of evidence that the father acted in bad faith or with the intent to deprive the infants of their interest in the property, his title to the premises was a marketable one. *KULLMAN v. COX*..... 158

2. — *Specific performance of an oral agreement by which a daughter promised to convey lands, for which the father had paid, as he might direct.*] A real estate dealer having an insane wife and wishing, in the pursuit of his business, to deal in real estate free from any claim of dower therein on the part of his wife, who was incompetent to join in a conveyance of it, purchased property in the name of his daughter upon her promise to convey it as he might thereafter direct, paid the purchase price in part in cash and in part by a mortgage signed by his daughter and himself, which mortgage was afterwards paid by him, collected all the rents and appropriated them to his own use without any protest on the part of his daughter, and paid all taxes and water rents on the premises.

*Held*, that the transaction was an agreement fully performed on the father's part, and did not come within the Statute of Uses and Trusts, declaring that where a grant is made to one person and the consideration is paid by another, no trust shall result in favor of the party paying the purchase price;

That a court of equity would decree specific performance of the contract.  
*JEREMIAH v. PITCHER*..... 402

3. — *Specific performance not decreed where the land is held adversely to the vendor.*] A vendee cannot be compelled to specifically perform a contract

**SPECIFIC PERFORMANCE**— *Continued.*

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for the purchase of land where, at the time fixed for performance, it is in the actual possession and occupation of persons claiming title and possession adversely to the vendor and those under whom he claims.

BULLARD *v.* BICKNELL..... 319

4. — *Deed by an executor under a power of sale of land held adversely.* [Quare, whether the provisions of the Real Property Law (Laws of 1896, chap. 547, § 225) making a grant of real property absolutely void, if the property be at the time "in the actual possession of a person claiming under a title adverse to that of the grantor," is applicable to a conveyance by an executor acting under a power of sale given by his testator's will. *Id.*

— *Oral agreement by a vendee, in consideration of a deed of land, to discharge mortgages on other land of the vendor—when an action is for specific performance and not to remove a cloud on title.*

See PURDY *v.* COLLYER ..... 336

**STATUTE :**

See REVISED STATUTES.

See SESSION LAWS.

See UNITED STATES REVISED STATUTES.

**STATUTE OF FRAUDS**— *Oral agreement by a vendee, in consideration of a deed of land, to discharge mortgages on other land of the vendor.*

See PURDY *v.* COLLYER ..... 336

**STATUTE OF LIMITATIONS :**

See LIMITATION OF ACTION.

**STOCK**— *In corporations.*

See CORPORATION.

**STREET**— *In a city.*

See MUNICIPAL CORPORATION.

**SUBORNATION OF PERJURY :**

See CRIME.

**SURPLUS MONEYS :**

See MORTGAGE.

**SURRENDER**— *Of a fire insurance policy.*

See INSURANCE.

**TAX**— *When the machinery of a corporation is taxable as "land."* 1. The rule to be applied in determining whether machinery in use by a corporation upon its own land is real or personal property for the purposes of taxation is as rigid as that which obtains between a vendor and a vendee upon a question of fixtures.

Machinery, consisting in part of machines standing on brick or wooden foundations, fastened with bolts, in part of machines slightly fastened with screws, and in part of shafting, all capable of being removed without material injury to the buildings in which they are, which has been placed in the building by its owner, a manufacturing company, for the purpose of conducting a manufacturing business, to which it is essential, and which has been purchased, together with the premises, by a corporation which conducts a similar business thereon, must be deemed to have been permanently annexed to the land for the purposes of the business, and as such is taxable as "land" within the meaning of that term as defined in the Revised Statutes.

PEOPLE EX REL. NAT. STARCH CO. *v.* WALDRON..... 527

2. — *Assessment for taxation—an award, made in condemnation proceedings, under chapter 490 of 1883, refused by owners as inadequate and deposited in a trust company to their credit.* [The owners of lands, taken by the city of New York in condemnation proceedings instituted under chapter 490 of the Laws of 1883, by section 10 of which the title vested in the city upon the fling of the oath of the commissioners of appraisal, refused to accept an award of \$10,000, upon the ground of its inadequacy, and the money was deposited in a trust company to the credit of the owners, who took an appeal to the Appellate Division from the order confirming the report of the commissioners.

**TAX** — *Continued.*

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*Held*, that the town assessors were justified, under subdivision 4 of section 2 of the Tax Law (Laws of 1896, chap. 908), in assessing the owners upon the \$10,000 so deposited. *PEOPLE EX REL. LYON v. HALSTED* ..... 316

3. — *Taxation of a corporation — a deduction of ten per cent of its capital stock depends on its surplus equalling that sum.*] Under the Tax Law (Laws of 1896, chap. 908, §§ 12, 31) a corporation is entitled to a deduction of ten per cent of the amount of its capital stock only when its surplus profits or reserve fund, as returned for taxation, equal ten per cent of its capital stock. *PEOPLE EX REL. CITIZENS' ILLUM. CO. v. NEFF*..... 542

4. — *Failure to prove the source of a surplus.*] Assuming that a corporation is not concluded by a statement, made in its return to city assessors, that it has no surplus profits or reserve fund, still it is not entitled to a deduction upon the ground that its surplus exceeds ten per cent of its capital stock, where it appears that the alleged surplus may have resulted from an enhancement of the value of its franchise, which is exempt from taxation. If such surplus proceeds from savings or accumulations from its business, that fact should be affirmatively shown by it. *Id.*

5. — *An objection not taken before the assessors is not available at Special Term.*] An objection that a corporation was assessed in the wrong ward, which was not taken before the assessors, is properly disregarded by the Special Term upon the hearing under a writ of certiorari issued to review the assessment. *Id.*

**TAXPAYER'S SUIT** — *To prevent waste — injunction to restrain an electric company from unlawfully excavating in a public park, in order to set poles — failure to allege that city officials intend to do an unlawful act.*] 1. Where the complaint in an action, brought by a taxpayer under the statutes permitting him to sue in order to prevent a waste of or an injury to property, funds or estate of a municipality (Laws of 1881, chap. 531, as amended by Laws of 1892, chap. 301), and to prevent any illegal action by the officers thereof (Code Civ. Proc. § 1925), alleges that the principal defendant, a gas and electric company, is, without warrant or authority of law, making excavations in a public park in order to set poles for stringing wires, to the injury and waste of the property of the municipality, and that certain other defendants, as commissioners, respectively, of the city department of public parks and of its board of electrical control, have permitted or are permitting this alleged waste of city property, but does not allege that either set of officials has granted or proposes to grant the gas and electric company any permission, license or franchise to do the acts complained of, or that these officials have knowledge, either actual or constructive, of such acts, the complaint is insufficient, and an injunction granted *pendente lite* must be vacated. *SHEEHY v. McMILLAN*..... 140

2. — *An injunction depends on the complaint only.*] The cause of action attempted to be alleged in the complaint in such a case cannot be perfected, for the purpose of sustaining an injunction order, by the aid of other papers used on a motion therefor. *Id.*

3. — *Waste defined.*] *Semble*, that the terms "waste" and "injury," as used in the statutes above mentioned, do not comprehend individual acts, but only illegal, wrongful and dishonest acts of public officials. *Id.*

**TENANCY** — *In its relation to tenure under a lease.*

*See* LANDLORD AND TENANT.

— *In common and joint tenancy in personal property, other than vessels.*

*See* PERSONAL PROPERTY.

**TICKET** — *Sale of*

*See* CARRIER.

**TITLE** — *To personal property.*

*See* PERSONAL PROPERTY.

— *To real property.*

*See* REAL PROPERTY.

**TORT:**

*See* NEGLIGENCE.

**TRADE MARK**—*Action by "The Commercial Advertiser" to restrain the use of the name "New York Commercial" by another newspaper.*] 1. In order that an injunction shall be granted to one newspaper to restrain another in the use of a title similar to the name of the former newspaper, the simulation must be such as is calculated to mislead the public, and consequently to injure the newspaper's circulation and patronage; if the simulation have such effect, it is immaterial that the name was innocently and conscientiously used.

Upon a motion made by a corporation which published a newspaper called *The Commercial Advertiser* to restrain the proposed publishing of a newspaper to be called the *New York Commercial*, it appeared that *The Commercial Advertiser* was a daily evening newspaper published in the city of New York, devoted to general news and sold at two cents a copy, while the *New York Commercial* was to be a daily morning newspaper published in the city of New York, devoted exclusively to commercial, financial, trade and shipping news and sold at five cents a copy, and that the two papers would be markedly dissimilar in their typographical arrangement and appearance.

*Held*, that the foregoing facts did not entitle the plaintiff to an injunction order restraining the defendant's use of the name *New York Commercial*;

That the fact that *The Commercial Advertiser* was popularly known as the *Commercial* or *The New York Commercial* did not give a proprietary right to *The Commercial Advertiser* to the exclusive use of the word *Commercial* regardless of any question of the actual or probable injury occasioned to it from the use of the name *New York Commercial* by another paper.

COMMERCIAL ADV. ASSN. v. HAYNES..... 279

2. — *Use of a business name—injunction to prevent another person from assuming it.*] A person whose name was not Cameron established a ready-made clothing house under the name "Cameron's," and made a reputation for the name, giving it a value as a clothing-house designation.

*Held*, that she was entitled to an injunction restraining another person, who had opened a ready-made clothing store in the immediate vicinity, from assuming such name (not his own) in his business, and thereby deceiving the public into the belief that the defendant's place of business was in fact that of the plaintiff. CHURCH v. KRESNER..... 349

**TRIAL**—*Improper comments of the court in the presence of the jury—cured by the charge.*] 1. A statement by the court, made on the defendant's application for an adjournment of the trial of an action because of the absence of four witnesses, that the counsel for the defendant was "simply trying to fool, to hoodwink the jury, that is all," is cured, where the court, in its charge, subsequently directs the jury to disregard the whole matter, including its remark "that it was mere hoodwinking a jury to allude to absent witnesses."

KLINKER v. THIRD AVENUE R. R. Co. .... 323

2. — *Mode of reviewing such comments.*] *Semble*, that since the amendments to section 88 of the Code of Civil Procedure, requiring the stenographer to note remarks and comments of the judge during the trial, the method of reviewing improper utterances of the trial court in the presence of the jury is by exception. *Id.*

3. — *Record relative to the denial of a motion for an adjournment.*] Where, in the course of a trial, it is evident that the counsel for the defendant is trying to make up a record which will show that his application for an adjournment has been improperly denied, the court may properly direct that the stenographer note on the record that an inquest has once been taken in the action. *Id.*

4. — *Decision of a motion to direct a verdict—exception thereto, how taken, when the decision is reserved—power of review by the appellate court.*] Where the decision upon a request made at the trial of an action by each of the parties for the direction of a verdict in favor of such party has, by consent, been reserved, if the unsuccessful party neither files, under sections 994 and 1185 of the Code of Civil Procedure, a notice of an exception to the decision of the court within ten days after its service upon him, nor appeals from the denial of a motion for a new trial, the appellate court has no power to review the correctness of the decision of the trial court in its direction of a verdict, but is limited to a consideration of the exceptions taken on the trial.

ELLIOTT v. VAN SCHAICK..... 587

**TRIAL**—Continued.

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5. — *Charge as to the credibility of witnesses and as to the measure of damages.*] Where, on the trial of an action brought by a passenger against a railway corporation, the judge, after instructing the jury to discriminate between witnesses not only as to intelligence, but also as to capacity, adds: "Now, Mrs. Norton (the plaintiff) appears to be a respectable lady — down to the witnesses who are the officers of the road (the defendant)," the remark cannot be construed as a statement that the plaintiff was telling the truth and the officers of the defendant were not; nor is it necessary for the court, after charging the jury that the plaintiff has a right to recover only compensatory damages, to charge that she cannot recover vindictive damages or smart money. *NORTON v. THIRD AVENUE R. R. Co.*..... 60

6. — *Dismissal of an action for want of prosecution.*] A passive attitude for a year and a half, during which time the plaintiffs have shown no diligence in attempting to serve the summons upon necessary defendants whom it was possible to serve, justifies a dismissal of a complaint.  
*HENRIQUES v. STERLING.* (Nos. 1 & 2)..... 30

7. — *Breach of contract — failure to pay as agreed — excuse shown therefor presents a question of fact.*] If, in an action for a breach of contract, excuse be given for a failure to pay as agreed, a question of fact is presented.  
*DEVROY v. NEW YORK CUT FLOWER Co.*..... 539

— *Bill of particulars, applied for on the ground that it is necessary to enable the defendant to answer — it cannot be granted upon the ground that it is necessary to enable the defendant to prepare for trial.*  
*See McCLELLAN v. DUNCOMBE.*..... 353

— *Police board of the city of New York — a conviction reversed as against the weight of evidence — a charge preferred as an afterthought after another charge has been dismissed.*  
*See PEOPLE EX REL. WALKER v. ROOSEVELT.*..... 183

— *Expulsion of a member from a club — notice that a charge will be considered at a hearing before the board of directors — the proof may be made as broad as the notice.*  
*See PEOPLE EX REL. WARD v. UPTOWN ASSN.*..... 297

— *Negligence — a woman injured at a railroad crossing — proof which requires the submission to the jury of the question of contributory negligence.*  
*See HOUSE v. ERIE RAILROAD Co.*..... 559

— *A crime charged as a second offense — proof, on the trial, of the former offense although the prisoner admits it — it is not violative of the Constitution.*  
*See PEOPLE v. SICKLES.*..... 470

— *Appeal — to authorize a review of a decision made under Code Civ. Proc. § 1022, an exception must be filed.*  
*See PRICE v. LEVY.*..... 620

— *Presumption that a mailed letter was received — a denial of its receipt by a party in interest presents a question for the jury.*  
*See MORAN v. ABBOTT.*..... 570

— *Verdict contrary to the weight of evidence — negligence — a child run over when stepping off a street car.*  
*See FICK v. METROPOLITAN STREET R. Co.*..... 84

— *The plaintiff cannot change her position on the trial — improper refusal to charge.*  
*See PATTERSON v. WESTCHESTER ELECTRIC R. Co.*..... 336

— *Police — dismissal of a policeman for misconduct — a conviction must precede it.*  
*See PEOPLE EX REL. REIDY v. GRADY.*..... 592

— *The insufficiency of facts pleaded as a defense should be raised by demurrer, not by motion.*  
*See KELLY v. ERNEST.*..... 90



**TRIAL**—*Continued.*

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— *Malicious prosecution—when the question of probable cause is for the court.*

See FRANCIS v. TILYOU..... 340

— *Libel—what erroneous charge is insufficient for a reversal.*

See YOUNG v. FOX..... 261

— *Place of.*

See VENUE.

**TRUST**—*Transfer of a fund, collected by subscription by an alumni association, to a seminary upon certain conditions—violation of the conditions by the seminary—incorporation of the association vesting the title to the fund in it—right of the corporation to retake the fund from the seminary.*] 1. An unincorporated alumni association of a theological seminary, having pledged itself to the work of establishing a professorship in the seminary, requested the seminary's approval of such work, which approval was expressed in a resolution of its trustees which recognized the association "as agents accordingly, and earnestly commends their agency to the confidence and liberality of the church."

The association thereafter collected upwards of \$25,000 for this purpose, and paid it to the seminary upon certain express written conditions, which conditions for several years were recognized and complied with by the seminary in the use of the income of the fund, and the rights of the alumni association therein were also recognized by various other acts on the part of the seminary inconsistent with any claim of ownership thereof by the seminary.

Subsequently, at an annual meeting of the association, by a unanimous vote, the alumni directed that steps be taken to incorporate the association, which was done, every member of the association in good standing at the time of the incorporation being elected, by name and individually, a member of the corporation.

*Held*, that a valid trust was created upon the conditions which the seminary had assented to, which it was estopped from questioning;

That its refusal to comply with such conditions authorized a judgment in favor of the subsequently formed corporation retransferring to it the fund in question;

That the action of the alumni in directing the incorporation of their association was effective to vest the corporation so formed with the title to the fund;

That, under the circumstances of this case, the use of the word "agents" in the resolution of the trustees of the seminary could not properly be given a construction which would make the alumni, at the time the fund was collected, mere agents of the seminary in the collection and payment over to it of this fund. ASSOCIATE ALUMNI v. GENERAL SEMINARY..... 144

2. — *When a trustee holding a mortgage has power to assign it and his assignee to receive the principal—the mortgagor is not bound to see that it is properly applied.*] The will of a testator directed his executors to invest \$6,000 upon bond and mortgage, and bequeathed part of the income thereof to his mother and part to his sister for their lives, and provided that after the death of either or both of them the interest money should be "collected, controlled, managed and held in trust" by a trustee for the benefit of the testator's two children, "in such manner as shall yield the greatest aggregate increase."

By a subsequent clause the testator directed that the executors should immediately deliver the mortgage to a specified trustee who was to "control and manage said securities, receive, collect and pay over the interest and principal due or to grow due thereon, and in all things to carry out the directions and provisions of this will as to said investment of six thousand dollars and any matter connected therewith;" and upon the two infant children of the testator respectively attaining their majority, an event which was, in the case of the youngest child, fifteen years distant, they were each to obtain a moiety of the principal of the fund and of any interest thereon.

*Held*, that under the will the trustee had the power to vary the investment and change the securities;

That the mortgagor was protected in paying the mortgage upon the maturity thereof to the attorney of the trustee to whom the trustee had

**TRUST — Continued.**

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assigned it, and was not bound to ascertain whether the trustee had acted providently or honestly in so assigning it.

SPENCER v. WEBER..... 285

8. — *Powers of a trustee to discharge obligations — the debtor is not affected by a misappropriation of the money by the trustee.*] Where a trustee has power by the terms of his trust to manage the securities and vary the investment, he has power to transfer the personal property of the trust and to collect the moneys and incidentally to give proper discharge therefor, and the debtor is not bound to see to the proper application of the moneys by the trustee to the purposes of the trust. *Id.*

4. — *Misappropriation of trust money — an action for its recovery is an equitable action.*] An action brought by the executrix of an estate to recover from a firm of stockbrokers money which a temporary administrator of the estate previously appointed had lost in speculations conducted through that firm, on the ground that the firm had knowledge that the money so used was trust money, is equitable in its character — the plaintiff being entitled to an accounting for such money, and, if profit has been made, to such profit, and, if a loss has resulted, to the sum of money thus misappropriated, with interest. MARSHALL v. DE CORDOVA..... 615

5. — *The misappropriation only need be proved by the plaintiff — defense of its repayment or of a release rests on the defendant.*] In such a case, whether the action be deemed one at law or in equity, a demand is not a necessary preliminary to its maintenance. The plaintiff in the action is only bound to establish the fact that the trust money has been misappropriated; and a defense that the right to recover it has been lost by its repayment, or by a release or otherwise, is an affirmative defense to be alleged and proved by the defendant. *Id.*

6. — *Notice — inquiry required.*] The receipt by the brokers of a check drawn on a bank by a customer "as trustee" and deposited with the brokers in an account with this customer "as trustee," and proof that a subterfuge to withdraw the money from the category of trust funds was resorted to by a repayment of the money by a check drawn by the brokers to the trustee, who immediately deposited the proceeds of such check with the brokers, were considered to be sufficient evidence of notice on their part of the trust character of the money; and an inquiry made, after the money had been embarked in the speculation, by a member of the firm, of the trustee only, was held to be an insufficient discharge of the duty of investigation imposed by such notice. *Id.*

7. — *Deed — a direction to a trustee to convey is not a present gift.*] A direction, contained in a deed of trust, that the rents and profits of certain premises be paid to the wife of the grantor during her life, and upon her death to him, should he survive her, and that, after the death of the survivor of the parents, the trustee should convey the premises to the children of the grantor in fee — the issue of any child who should have died leaving issue at the death of the survivor of the parents to take the same share which their parent would have taken if living — contains no words of present gift, and final distribution must be made among those persons who constitute the class at the time when the division is directed to be made.

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— *Specific performance of an oral agreement by which a daughter promised to convey lands, for which the father had paid, as he might direct.*

See JEREMIAH v. PITCHER..... 402

— *Notice of the appointment of a new trustee of a mortgage.*

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**ULTRA VIRES:**

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See CONTRACT.

**UNITED STATES REVISED STATUTES** — § 3722 — *Government contract — agreement to do work upon the articles to be supplied — objection that the government contractor was not a manufacturer or regular dealer in the articles to be supplied.*

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— § 3737 — *Government contract — agreement to do work upon the articles to be supplied is not an assignment of the contract.*

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**USAGE** — *When it is not improper to exclude evidence of the custom of the building trade as to what is included in the expression a "seven-story building."*

See *ADAMANT MANUFACTURING CO. v. BACH*..... 255

**VENDOR AND PURCHASER :**

See *DEED*.

**VENUE** — *Changed for the reason that the cause of action arose, and that both parties reside, in New York.*] 1. Where, on a motion to change the place of trial of an action from the county of Queens to the county of New York, made on the ground that the convenience of witnesses and the ends of justice will be promoted by the change, it appears from the defendant's affidavit that the cause of action arose in the city of New York, in which county both the plaintiff and defendant reside, the motion will be granted for the reasons last stated, although no demand for a change, as a matter of right, has been made under section 986 of the Code of Civil Procedure.

*NAVRATIL v. BOHM*..... 460

2. — *It will not be changed from Queens county to New York county for the convenience of witnesses.*] *Semble*, that the place of the trial of an action will not be changed from the county of Queens to that of New York upon the ground of the convenience of witnesses. *Id.*

**VILLAGE :**

See *MUNICIPAL CORPORATION*.

**VOTE** — *At an election.*

See *ELECTION*.

**WAGES :**

See *SERVICES*.

**WAIVER** — *Life insurance — waiver of a cash payment of the premium — effect of paying another policy upon the same life under the same state of facts.*

See *TOOKER v. SECURITY TRUST CO.*..... 372

**WASTE** — *Action by a taxpayer to prevent waste — injunction to restrain an electric company from unlawfully excavating in a public park in order to set poles — failure to allege that city officials intend to do an unlawful act.*

See *SHEEHY v. McMILLAN*..... 140

**WIFE :**

See *HUSBAND AND WIFE*.

**WILL** — *Void gifts to benevolent societies — a son, the residuary devisee and legatee, prevented by the will from taking them — he takes them as heir at law — rule of construction of a will.*] 1. A testatrix left a son, who was her only heir at law, and gave by her will certain property to benevolent societies, which gifts, being in violation of the statute upon that subject, were consequently invalid. The son was named as a devisee and legatee as to some part of the residuary estate, but his right to take was so conditioned by the will that he could not take under the residuary clause the property thus attempted to be given to the benevolent societies.

*Held*, that the son being disqualified to take as residuary legatee, the testatrix died intestate as to such property given to the benevolent societies, and that the son took such property as her heir at law;

That, while the void provisions of a will may be resorted to for the purpose of ascertaining the intention of the testator with reference to the right of any person to take under other provisions of the will, they cannot be resorted to for the purpose of preventing the operation of the Statute of Descents and to substitute collateral for direct heirship.

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**WILL** — *Continued.*

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2. — *An imperative power of sale, although discretionary as to the time and circumstances of its exercise by executors, passes to an administrator with the will annexed.*] A testator by his will, referring to his executors, provided as follows: "I authorize and empower them, at their discretion, to sell and convert all my real estate, and I direct them to divide the net proceeds of both real and personal estate into three equal and separate portions or funds."

*Held*, that the words "at their discretion" related to the time at which, and the circumstances under which, a sale might be made, but were not intended to give any discretion as to whether or not a sale should be made;

That the direction to sell was mandatory, and that the power, not having been exercised by the executors, might be exercised by an administrator with the will annexed. *CARPENTER v. BONNER* ..... 452

3. — *A declaration, that personal property shall "belong" to children, conveys a vested devisable remainder—how far a subsequent gift over by way of substitution modifies it.*] Where the will of a testator declares that, after the death of his wife, his personal property "shall belong to my (his) children, the descendants of any deceased child to take the share their parent would have taken, if living," the children living at the testator's death take remainders which vest at once and are devisable; and a subsequent provision of the same clause that "if no descendants of mine survive my said wife, then my property shall belong and be delivered over by my executors to the same persons named as residuary legatees in case of such failure of descendants, in the next clause of this will, and in the same proportions," does not postpone the vesting of the remainders already created by the express words of the gift, but is merely a gift over by way of substitution, upon the contingency of an absolute failure of issue of the testator at the time of the death of his widow. *PAGET v. MELCHER* ..... 12

— *Action in ejectment to recover land, alleging that a deed and will were executed by fraudulent inducement—not changed into an equitable one by a demand for unnecessary equitable relief.*

*See BENNETT v. VONDER BOSCH* ..... 311

**WITNESS** — *Expert employed to investigate in reference to the fall of a building—he may charge fees for attending a coroner's investigation.*] 1. Where the employment by a corporation, insuring contractors against liability to their employees and others arising out of the negligence of such contractors, of an expert to investigate the cause of the fall of a building in the construction of which the contractors were employed, has been proved, the expert is entitled to be compensated by the corporation for attending and testifying at a coroner's investigation of the matter, and for an investigation as to the accident, made by him in order to qualify himself as an expert witness. *BROWN v. TRAVELERS' LIFE & ACC. INS. CO.* ..... 544

2. — *Expert testimony.*] Upon the trial of an action, based upon the negligent act of the owner of a building, which fell and killed a tenant therein, to recover damages resulting from his death, an expert witness should be permitted to answer the question, "Now state what, in your opinion, was the cause of the falling of that building," and the further question, "Well, how, in your opinion, did the force of the storm affect the building so as to cause it to fall—in what way."

*QUIGLEY v. JOHNS MANUFACTURING CO.* ..... 434

— *Subornation of perjury—proof of acts and declarations of conspirators, out of each other's presence, is admissible—proof of attempts to induce others to swear falsely—cross-examination as to collateral matters.*

*See PEOPLE v. VAN TASSEL* ..... 445

— *Evidence to establish a partnership—declarations made in the absence of the alleged partner—a witness' understanding as to the person referred to is incompetent.*

*See LAWRENCE v. THOMPSON* ..... 308

— *Expert testimony as to oscillations of cars a month after an accident.*

*See SCHMIDT v. CONEY ISLAND & B. R. R. CO.* ..... 391

— *Testimony as to the value of the good will of a partnership.*

*See KIRKMAN v. KIRKMAN* ..... 395

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